No. 93-661

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WHITE CONSOLIDATED INDUSTRIES, INC.,
Petitioner,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

WHITE CONSOLIDATED INDUSTRIES, INC., and JOHN DOE(S),
Petitioners,

– against –

THE BLAW KNOX RETIREMENT INCOME PLAN, BLAW KNOX PENSION PLAN, BLAW KNOX IAM PENSION PLAN, BLAW KNOX EQUIPMENT PENSION PLAN, BLAW KNOX DURALOY PENSION PLAN FOR SALARIED EMPLOYEES, BLAW KNOX DURALOY HOURLY PENSION PLAN and FIDUCIARIES DEAN G. WILSON and RICHARD A. McINTYRE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM McGUINNESS
Counsel of Record
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
(A Partnership Including Professional Corporations)
Attorneys for Petitioners
One New York Plaza
New York, New York 10004
(212) 820-8000

Dated: October 26, 1993

QUESTIONS PRESENTED

1. Whether under the plain meaning of section 4069 of the Employee Retirement Income Security Act of 1974 ("ERISA"), the sale of a business "becomes effective," as normally understood, on the closing date of the sale for purposes of computing section 4069's five-year liability period, and for purposes of applying its effective date so as not to give section 4069 an unintended retroactive effect.

2. Whether, in determining liability for plan termination under section 4062 of ERISA, the sale of a business may be treated as a sham solely because the seller was motivated by a desire to be relieved of pension liabilities or whether, in addition, it must be shown that the sale has no economic effect.

LIST OF PARTIES PURSUANT TO RULE 29.1

The following statement is provided pursuant to Rule 29.1 of the United States Supreme Court Rules, which requires that this brief include a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Petitioners.

Petitioner is White Consolidated Industries, Inc. Petitioner's parent is AB Electrolux.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner White Consolidated Industries, Inc. ("WCI") respectfully prays that a writ of certiorari issue pursuant to Supreme Court Rule 12.2 to review the judgments of the United States Court of Appeals for the Third Circuit rendered in each of the above-captioned related cases and entered on June 30, 1993. The facts of both related cases are identical, and identical

resolution of the legal issues is compelled with equal force in both cases.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit in *Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, is reported at 998 F.2d 1192 and is set forth in the Appendix to the Petition ("App.") at 1-21. The opinion of the Court of Appeals for the Third Circuit in the related case, *The Blaw Knox Retirement Income Plan, et al. v. White Consolidated Industries, Inc., et al.* is reported at 998 F.2d 1185, and is set forth at App. 22-38. The unreported decisions of the United States District Court for the Western District of Pennsylvania from which the two related appeals were taken were issued on September 11, 1993 and are reprinted at App. 39-81.

JURISDICTION

The judgments of the Court of Appeals for the Third Circuit in these two related cases were entered on June 30, 1993. Petitioners timely filed Petitions for Rehearing With Suggestion of Rehearing In Banc on July 14, 1993. The Petition for Rehearing filed in *Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, No. 92-3676, was denied on July 30, 1993. App. 82-83. The Petition for Rehearing filed in *The Blaw Knox Retirement Income Plan, et al. v. White Consolidated Industries, Inc., et al.*, No. 92-3612, was denied on July 28, 1993. App. 84-85. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves sections 4062 and 4069 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1362, 1369, which provide in pertinent part:

§ 1362. Liability for termination of single-employer plans under distress termination or termination by corporation [PBGC]

(a) In general

In any case in which a single-employer plan is terminated in a distress termination under section 1341(c) of this title or a termination otherwise instituted by the corporation [the PBGC] under section 1342 of this title, any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability under this section.

§ 1369. Treatment of transaction to evade liability, corporate reorganization

(a) Treatment of transactions to evade liability

If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date. This subsection shall not cause any person to be liable under this subtitle in connection with such plan termination for any increases

or improvements in the benefits provided under the plan which are adopted after the date on which the transaction referred to in the preceding sentence becomes effective.

Congress provided that § 1369(a) "shall apply with respect to transactions becoming effective on or after January 1, 1986." Pub. L. No. 99-272 § 11013(b), 100 Stat. 261 (1986), 29 U.S.C. § 1369 ("Effective Date") (Supp. 1993).

STATEMENT OF THE CASE[1]

The case arises out of the sale by petitioner WCI to Blaw Knox Corporation ("BKC" or "Blaw Knox") -- an unaffiliated third party -- of a group of WCI's steel manufacturing divisions (the "Blaw Knox Businesses") and the accompanying transfer to BKC of the sponsorship of the pension plans that covered the employees of those businesses (the "Plans"), pursuant to an Agreement of Purchase and Sale (the "Sale Agreement"). Under the explicit terms of the Sale Agreement, the sale closed on September 27, 1985.

1. The Statutory Scheme

Respondent the Pension Benefit Guaranty Corporation (the "PBGC") is a wholly-owned independent U.S. government corporation established by ERISA. The PBGC is responsible for the administration of the single-employer pension plan termination insurance program in Title IV of ERISA. 29 U.S.C. §§ 1301-1461. Under that program, the PBGC guarantees the payment of certain pension benefits to participants in the event a covered pension plan terminates with insufficient assets to pay for those benefits. 29 U.S.C. §§ 1302(a)(2), 1322, 1361. The PBGC receives no funds from tax revenues, and it finances the insurance program for single-employer pension plans primarily through

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[1] The Statement of the Case applies to both related cases.

premium revenues paid by the employers who sponsor those plans. 29 U.S.C. §§ 1305, 1307(e)(1)(A).

Prior to 1986, 29 U.S.C. § 1362 was the exclusive ERISA provision prescribing liability for termination of single-employer plans. In its pre-1986 form, § 1362 had no specific language for imposing liability on an unaffiliated predecessor sponsor when a plan terminated after a change of sponsorship. Thus, when WCI sold the Blaw Knox businesses and transferred the associated Plans in 1985, § 1362 was the sole provision governing termination liability of plan sponsors.

In 1986, Congress amended ERISA and explicitly addressed the issue of predecessor liability. While § 1362 was amended to define more specifically its coverage of plan sponsors, no provision at all was made for liability of any predecessor sponsor. Rather, Congress provided for predecessor liability in a new, separate provision, 29 U.S.C. § 1369(a), which reached sponsors of a plan who entered into any transaction to evade liability and the transaction became effective within five years before the termination date of the plan.[2]

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[2] Revised § 1362 was generally effective as of January 1, 1986, to be applied to plans which had not been terminated and for which termination proceedings had not been commenced prior to January 1, 1986. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L.No. 99-272, § 11019, 100 Stat. 82, 280-81 (1986), 29 U.S.C.A. § 1362, at 431 (Supp. 1993). Congress provided that new § 1369(a) was applicable with respect to transactions becoming effective on or after January 1, 1986. Pub.L.No. 99-272 at § 11013(b), 100 Stat. 82, 260-61 (1986); 29 U.S.C.A. § 1369, at 440 (Supp. 1993). Congress also enacted transitional rules under which, if the PBGC commenced termination proceedings with respect to a plan, former § 1362 would apply to such termination. The proceedings had to be commenced prior to January 1, 1986, or, under the PBGC's authority to implement temporary procedures, within 180 days

Congress carefully considered the appropriate way to police the transfer of pension plans and determined not to impose any substantive regulation on a company's sale of one of its businesses and the accompanying transfer of that business's pension plans. Instead, Congress crafted § 1369's precise five-year rule with the intention "that the PBGC carefully scrutinize transfers of unfunded pension liabilities." H.R. Rep. No. 99-241, pt. 2, 99th Cong., 2d Sess. at 56, reprinted in 1986 U.S.C.C.A.N. 685, 714.

Thus, as part of the regulatory scheme governing the transfer of plan sponsorship, if the plans are underfunded,[3] the PBGC requires the filing of comprehensive financial and actuarial information regarding the affected pension plans, and their old and new sponsors. 29 C.F.R. §§ 2615.3, 2615.23 This notification allows the PBGC to carefully scrutinize transfers of plan sponsorship, enabling it to determine which covered pension plans are put at risk by corporate transactions and need to be monitored immediately. The PBGC thus has five years in which to decide to terminate the transferred plan and to seek to impose liability on the predecessor sponsor under § 1369. 29 U.S.C. § 1342(a)(1)-(4). In this way, the PBGC is able to safeguard against plan sponsors ignoring their pension liabilities and to protect the integrity of the insurance program.

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thereafter. Pub.L.No. 99-272 at § 11019(a)(2) and (c), 29 U.S.C.A. § 1341, at 409-411 (Supp. 1993). Under the transitional rules, the PBGC could have asserted a claim under former § 1362 with respect to the WCI-BKC transaction, which was reported to the PBGC on October 25, 1985, but it did not.

3 It is not uncommon for a pension plan such as this one, meeting the statutory funding requirements, to be underfunded. Underfunded status does not mean that a plan will be unable to make benefit payments in the future. ERISA's minimum funding standards are designed to establish a long-term, sound fiscal basis for pension plans.

2. Factual Background[4]

WCI is primarily a manufacturer of home appliances. Prior to 1985, WCI owned a group of companies, the "Blaw Knox Businesses," which were involved in unrelated steel manufacturing operations. The Blaw Knox businesses were unprofitable as a whole from 1981 through 1985, constituting a financial drain on WCI. App. 40. The Plans maintained for the employees of the Blaw Knox Businesses allegedly had substantial unfunded pension liabilities.

Beginning in 1983, WCI attempted to sell the Blaw Knox businesses, but was unsuccessful. App. 41. Finally, on September 27, 1985, WCI sold the Blaw Knox businesses to BKC, an unaffiliated third party. As part of the sale, BKC adopted and assumed the Plans, and assumed full responsibility for meeting the funding requirements of the Plans under ERISA. The PBGC alleged that under the Sale Agreement, WCI was required to make contributions directly to the Blaw Knox Plans in five annual $4 million installments. The Agreement also required BKC to contribute at least $1.2 million per year to the Plans for five years. App. 41-42.

As reflected in the Sale Agreement given to the PBGC as part of the notification process noted above, Blaw Knox was contractually obligated to obtain an irrevocable $15 million Letter of Credit to indemnify WCI for any liability WCI might incur with respect to the Blaw Knox Plans, including any liability from termination of the Plans. Blaw Knox also agreed to indemnify WCI for Plan liability in excess of the Letter of Credit. This

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[4] As required, both the District Court and the Court of Appeals accepted the allegations of the PBGC's amended complaint as true for purposes of WCI's motion to dismiss. The facts noted here are therefore drawn from the PBGC's amended complaint. Citations are to the District Court's opinion.

indemnity was secured by substantially all of BKC's assets. App. 42 n. 1.

Pursuant to the PBGC regulations discussed above, WCI promptly notified the PBGC of the transfer of plan sponsorship. Nearly two years later, on July 22, 1987, the PBGC responded that it had "completed a review of the reportable event and . . . determined that no further action is necessary." Joint Appendix pp. 151-55.[5]

3. The Proceedings Below

On September 26, 1991, six years after the closing of the sale transaction, and more than four years after it notified WCI that "no further action is necessary," the PBGC filed a complaint against WCI seeking a declaratory judgment that WCI would be liable for the transferred Plans' unfunded liabilities if and when they terminated. The PBGC's claims were asserted under 29 U.S.C. §§ 1362 and 1369, the ERISA provisions prescribing when contributing sponsors and predecessor sponsors,

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5 Although the PBGC has never alleged that WCI violated any of ERISA's specific requirements or any PBGC regulations in connection with the sale of the Blaw Knox Businesses, in order to dispel any possible implication to the contrary, WCI attached to its motion to dismiss a copy of its notice to the PBGC and the PBGC's responsive letter. The Court of Appeals determined that the notice and the PBGC responses, which are available to the public under 29 C.F.R. pt. 2603, were not public records and therefore could not be considered on the motion to dismiss. WCI contends that that ruling was erroneous and the letters were properly before the courts below to show that WCI complied with the reporting requirement.

respectively, are liable for unfunded benefit liabilities upon plan termination.[6]

WCI moved to dismiss the original complaint. Instead of responding to WCI's motion, the PBGC proceeded to terminate one of the largest Blaw Knox pension plans, effective February 29, 1992 because it allegedly no longer had assets available to pay benefits currently due. 29 U.S.C. § 1342. The PBGC then filed an amended complaint.

The PBGC alleged that WCI structured the sale of the Blaw Knox Businesses so that the Plans would not terminate within five years of the transaction, and WCI would thereby not be subject to liability under § 1369, which was then being considered by Congress. It was further alleged that WCI's sale of the Blaw Knox Businesses was an attempt by WCI to evade its pension obligations and limit its pension liabilities. The amended complaint asserted five different causes of action seeking to hold WCI liable for the unfunded benefits of the Plans under 29 U.S.C. §§ 1362 and 1369. The District Court granted WCI's motion to dismiss all of the claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and entered judgment for WCI.[7]

The District Court dismissed Count I, which alleged a "Sham Transfer" theory of § 1362 liability, because the pleaded facts did not show that the 1985 WCI-BKC transaction had no

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6 In a companion case filed on the same day as the *PBGC* complaint, *The Blaw Knox Retirement Income Plan, et al. v. White Consolidated Industries, Inc. et al.*, C.A. No. 91-01629, (hereinafter the "*Blaw Knox* companion case") the Plans and their fiduciaries included allegations against WCI identical to those in the *PBGC* complaint.

7 The District Court also dismissed all of the claims in the *Blaw Knox* companion case.

legitimate business purpose or economic effect. App. 46. Noting that the Blaw Knox Businesses have sustained significant operating losses apart from the required pension plan contributions, the District Court held that WCI's sale of an unprofitable business served a legitimate business purpose and was not a sham. App. 46-47.

The District Court also dismissed the PBGC's § 1369 claim in Count IV, holding that, based on a "plain reading of § 1369," the WCI-BKC transaction became effective on its closing date in 1985. App. 53. The District Court specifically noted that on the closing date, BKC assumed all the liabilities of the Blaw Knox Businesses, including the pension liabilities of the Plans. App. 53. Moreover, the District Court noted that the PBGC made no allegation of any continuing involvement by WCI in BKC's business. WCI's payments to the Plans did not alter the date of legal transfer of the Plans to BKC, *i.e.*, the closing date. App. 54. Therefore, § 1369 was inapplicable, because the closing preceded § 1369's effective date and was more than five years before the termination of any of the Plans. App. 52-56.[8]

The PBGC appealed that decision to the Court of Appeals for the Third Circuit.[9] On June 30, 1992, the Third Circuit reversed the District Court's dismissal of Counts I and IV.

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8 Count V of the complaint in the *Blaw Knox* companion case contained allegations identical to those made by the PBGC in Counts IV and V. The District Court dismissed Count V of the *Blaw Knox* complaint for the same reasons that it dismissed Counts IV and V of the *PBGC* complaint. App. 75-80.

9 The PBGC did not appeal the dismissal of Count II, and the Third Circuit affirmed the District Court's dismissal of Counts III and V of the *PBGC* complaint.

The Third Circuit held that for purposes of § 1369, a transaction does not "become effective" until the company that transferred a plan no longer makes substantial pension contributions. App. 3, 14. The court reached this conclusion by deciding that "becomes effective" is an ambiguous phrase which the statute does not define. App. 11. The court therefore examined the legislative history, to interpret the phrase in the context of the legislative purpose. The Third Circuit focused exclusively on one Congressional goal, preventing companies from transferring unfunded liabilities to weak companies to evade liability for their pension obligations. App. 12.

The Third Circuit also held that Congress intended § 1369 to incorporate the predecessor liability rule established in *In re Consolidated Litig. Concerning Int'l Harvester's Disposition of Wisconsin Steel*, 681 F. Supp. 512 (N.D. Ill. 1988) ("*Harvester*"). The *Harvester* rule established predecessor liability if the employer intended to evade pension obligations and the transferee had little economic chance of success. The Third Circuit believed it was "reasonable to assume" that § 1369's five-year rule was a substitute for *Harvester*'s test of the economic viability of the new sponsor at the time of the transfer. App. at 14. The Third Circuit then announced a new rule, holding that a transaction does not "become effective" for purposes of computing § 1369's five-year rule until after "the company that transferred a pension plan no longer makes substantial pension contributions." App. 14. This rule, the court believed, would best "reflect the transferee's economic stability at the time of the transfer." App. 14.

The Third Circuit also reversed the District Court's dismissal of Count I, holding that the PBGC had adequately alleged that the WCI-BKC sale was a sham transaction that could be disregarded. Thus, the court held, WCI could be held liable under § 1362 as the employer on the date the plan terminated in 1992. The Third Circuit defined a sham as a transaction that " 'is fictitious or . . . has no business purpose or economic effect.' "

(*quoting Lerman v. Commissioner of Internal Revenue*, 939 F.2d 44, 53 (3d Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 590 (1991)). App. 19. The Third Circuit rejected the PBGC's argument that *Gregory v. Helvering*, 293 U.S. 465 (1935), held that a transaction may qualify as a sham even if it has a purpose and effect in addition to tax avoidance. App. 19-20. Although acknowledging that disposing of an unprofitable business is a legitimate business purpose, App. 20, the Third Circuit found it "unclear from the pleadings" whether getting rid of the operating losses was a factor in WCI's decision to sell the businesses. App. 20. The court held that because the complaint alleged that WCI "was motivated solely by a desire to be relieved of pension liabilities," the PBGC's sham claim could survive a motion to dismiss. App. 21.[10]

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the interpretation and enforcement of ERISA §§ 1362 and 1369, which define who may be held liable for unfunded benefits when a pension plan is terminated. Congress explicitly enacted § 1369 as the exclusive provision for imposing liability on predecessor plan sponsors. In holding that a sale otherwise complete in all respects does not "become effective" under § 1369 until after "the company that transferred a pension plan no longer makes substantial pension contributions," App. 14, the Third Circuit disregarded § 1369's plain meaning and announced an uncertain and ill-advised rule in place of the test prescribed by Congress.

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10 In the *Blaw Knox* companion case, the Third Circuit also reversed the District Court's dismissal of Count V of the Blaw Knox Plans' complaint, for the reasons stated in its opinion in the *PBGC* case, and affirmed the District Court's dismissal of the remaining claims. App. 38.

The rule promulgated by the court below arbitrarily extends § 1369's five-year period if contractually fixed payments are made after the sale's closing, but not if the same payments were made at the time of closing. The decision's rationale also extends the five-year period unpredictably if there is any business or financial relationship between the seller and buyer after the sale.

In formulating its rule, the Third Circuit mistook the legislative record to reflect Congress's intent to codify the *Harvester* court decision, but that decision was issued two years after § 1369's enactment. The court below also misused legislative history to justify a rule which expands § 1369's reach, relying on "vague notions of its basic purpose," when it should rather have enforced § 1369 according to "the words of its text." *Mertens v. Hewitt Assocs.*, __ U.S. __, 113 S. Ct. 2063, 2077 (1993). Moreover, the Third Circuit's decision gives § 1369 retroactive effect in a manner that can not be squared with § 1369's explicit provision making it retroactive only for transactions becoming effective after January 1, 1986.

In focusing exclusively on protection of the pension insurance program, the Third Circuit overlooked competing interests and policies that were carefully balanced by Congress. The Third Circuit mistakenly assumed that § 1369 was intended to include a test of the "transferee's economic stability." App. 14. But adding that test, in fact, upsets the Congressional policy embedded in § 1369 as written by Congress.

Congress intended § 1369 to provide an explicit bright-line rule so as not to discourage the creation and maintenance of pension plans in new companies or new divisions of existing companies. Congress also sought to encourage employers to sell or spin off businesses with their pension plans intact, rather than to have businesses liquidated, workers laid off, and pension plans terminated. By creating uncertainty in § 1369's application, the Third Circuit decision defeats those policy goals.

It was also unnecessary for the Third Circuit to distort § 1369 in order to protect the pension insurance program. Under ERISA and PBGC regulations, with which WCI fully complied, the PBGC receives notice of the transfer of underfunded pension plans. The PBGC has ample authority to protect its interests during the five years following that notice.

The Third Circuit's interpretation of § 1362, which imposes liability on the plan sponsor on the plan's termination date, also disregards that section's plain language and Congress's intent. Under the "sham transaction" theory announced below, the PBGC may claim that a predecessor sponsor who sells a business to an unaffiliated buyer continues to be a "contributing sponsor" of a transferred pension plan upon its termination years later, indeed, even more than five years after the sale. That ruling both misapplies the Court's doctrine of disregarding sham transactions and defeats Congress's intent to make § 1369 the exclusive ERISA provision imposing predecessor sponsor liability.

The decision below thus warrants review for three reasons. First, the Third Circuit's ruling has decided an important question of federal law, the scope of predecessor liability under ERISA, which has not been, but should be settled by this Court. That ruling upsets the Congressional policy by creating uncertainty in an area where Congress intended a bright-line rule. Review by the Court is necessary to restore certainty to this important ERISA provision.

Second, the decision interprets ERISA §§ 1362 and 1369 in a way that conflicts with applicable decisions of this Court. The Third Circuit ruling ignores the Court's emphatic instruction that ERISA be interpreted based on its plain language. Failure to correct the Third Circuit ruling will invite other courts also to "improve" ERISA's provisions, rather than enforcing the words of their text.

Third and finally, the Court should exercise its supervisory role here to prevent the lower federal courts from allowing the PBGC to use §§ 1362 and 1369 in novel ways to expand the PBGC's remedies against predecessor sponsors. The express Congressional policy is that the PBGC scrutinize allegedly evasive transactions and take action against predecessor sponsors within five years. Rather than putting the onus on the PBGC to carry out its regulatory responsibilities, the Third Circuit instead modified § 1369's five-year rule and interpreted § 1362 to permit the PBGC's assertion of "sham" claims against predecessor sponsors who actually sold their businesses to bona fide purchasers.

As the District Court observed, § 1369 as written fully protects the pension insurance program. The ruling below unjustifiably excuses the PBGC from performing its regulatory functions, while affording the PBGC the opportunity, as in this case, to pursue novel theories in litigation against predecessor sponsors in federal court. The serious implications of that precedent specifically as it applies to the PBGC, and more generally as it affects other federal agencies in enforcing their own statutes, further warrant the Court's review of this case.

The Third Circuit's decision is thus unsound, unwise, and unfair. The petition should be granted to correct its conflict with this Court's precedents and with the Congressional policy reflected in ERISA's plain language.

I. THE THIRD CIRCUIT DISREGARDED THIS COURT'S PRECEDENTS AND UPSET ERISA'S BRIGHT-LINE RULE IN HOLDING THAT THE SALE TRANSACTION DID NOT "BECOME EFFECTIVE" ON THE CLOSING DATE

A. The Sale of a Business Transaction "Becomes Effective" Under 29 U.S.C. § 1369 on its Closing Date

This Court has made clear that in interpreting ERISA, the lower courts must enforce "the words of its text." *Mertens*, 113 S. Ct. at 2071. Those words must be given a "natural reading" and accorded a "normal meaning." *Estate of Floyd Cowart v. Nicklos Drilling Co.*, _ U.S. _, 112 S. Ct. 2589, 2595 (1992); see *McNeil v. United States*, _ U.S. _, 113 S. Ct. 1980, 1983, 1984 (1993)("normal interpretation" given to word "institute" in accordance with "the most natural reading of the statute"). The natural reading of the time when "the transaction becomes effective" renders § 1369 inapplicable to the sale of a business that closed months before § 1369's effective date and more than five years prior to the termination of any of the associated pension plans.

The term "becomes effective," as applied to the sale of a business, has a well-understood, common meaning. Both in legal and common usage, a transaction "becomes effective" when all conditions precedent are satisfied and the agreement between the

parties takes effect.[11] In the case of the sale of a business, it is commonly understood that the sale "becomes effective" at the time of closing. In this case, that is clearly what happened.

By its terms and in fact, the agreement and all its provisions became effective at the closing at 5 o'clock p.m. Cleveland time on September 27, 1985. Joint Appendix at 137 (Agreement ¶ 9.1). Indeed, the Third Circuit itself acknowledged that the sale, which was concededly made to an unaffiliated third party buyer, was complete in all respects in 1985 and that the post-sale payments were themselves part of the sale contract: "WCI made the post-sale payments to fulfill previously fixed contractual obligations. These obligations were not contingent on a future event or renegotiated after the sale. . . . [T]hese payments were part and parcel of the purchase and sale agreement." App. 16.

Nevertheless, the Third Circuit contradicted this finding, holding that the sale did not "become effective" for purposes of § 1369 until WCI completed those contractually required payments to the transferred pension plans. App. 15. The court reached this conclusion only by ignoring the well-settled understanding of when a sale transaction "becomes effective."

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[11] See *Black's Law Dictionary* 461-62 (5th ed. 1979) (defining "effect" as "The operation of a law, of an agreement. . . . The phrases 'take effect,' 'be in force,' 'go into operation,' etc., are used interchangeably."); *The Oxford English Dictionary* 79 (2d ed. 1989) (defining "effect" as "The state or fact of being operative . . . (of a law, an agreement, etc.) to come into force (*from* a certain date)") (emphasis added); *Webster's Third New International Dictionary* 724 (1986) (defining "effective" as "taking effect: VALID, OPERATIVE . . . (the order was [effective] as of June 7"). *See, e.g., Estate of Floyd Cowart*, 112 S. Ct. at 2595 (citing Black's Law Dictionary to identify the "normal meaning" of a statute's terms).

The Third Circuit observed that under § 1369 "a transaction need not 'become[] effective' on the same day it is 'enter[ed] into.' " App. 11. That, of course, is correct, because parties to the sale of a business may enter into an agreement and schedule the closing at a later time. But the court below jumped from that observation to the conclusion that a business sale transaction "does not necessarily become effective on the date of closing." App. 11. However, § 1369 is directed at sales and other transfers of businesses,[12] and in that context, the transaction is "entered into" upon the signing of a sale agreement and "becomes effective" at the closing of the sale.

The Third Circuit determined that it could resort to § 1369's legislative history because "becomes effective" is an "ambiguous phrase," which "[t]he statute does not define." App. 11. On the contrary, given the dictionary definition noted above and the statutory context, it would be commonly understood that a business sale transaction "becomes effective" at the closing. The phrase is thus clear and required no statutory definition. It must be enforced according to its normal meaning.

Any other interpretation would, in effect, lead to a retroactive application of § 1369, violating the fundamental requirement that statutes be read to avoid retroactive application wherever possible. This Court has stated on numerous occasions that "a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' " *United States v. Security Industrial*

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12 See H.R. Rep. No. 241, pt.2, 99th Cong., 2d Sess., at 33, 55-56 *reprinted in* 1986 U.S.C.C.A.N. 685, 691, 713-14; H.R. Rep. No. 300, 99th Cong., 1st Sess., at 304 (1985), *reprinted in* 1986 U.S.C.C.A.N. 756, 955.

Bank, 459 U.S. 70, 79 (1982) (citation omitted).[13] The Third Circuit's reading of the "becomes effective" language of § 1369 flouts that command by producing just such a retroactive effect.

In enacting § 1369 on April 7, 1986, Congress used the "becomes effective" language not only in defining the reach of predecessor liability in § 1369(a), but in specifying the effective date of the provision as well, stating that the new predecessor liability applies to "transactions becoming effective on or after January 1, 1986." Pub.L.No. 99-272, § 11013(b), 100 Stat. 261 (1986), 29 U.S.C. § 1369 ("Effective Date").[14] Thus, Congress manifested a clear legislative intent that the statute have retroactive application, but for a specific, limited period. As the Third Circuit expressly recognized, the phrase "becomes effective" must bear the same meaning in both places. *See* App. 15 n.2. Under the Third Circuit's interpretation, the new predecessor liability rule would apply to a sale of a business that closed years prior to enactment of the statute, as long as any substantial payments to the pension plan were still to be made, even if (as here) the payments were fully fixed by the long-since settled contract of sale.[15] Indeed, if the five-year limitations

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13 *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result"); *Bennett v. New Jersey*, 470 U.S. 632, 641 (1985). *See generally Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 840-58 (1990) (Scalia, J., concurring).

14 Congress further evidenced its intent that § 1369 not apply to pre-1986 transactions by enacting detailed transitional rules governing precisely how § 1362 would be applied with respect to transactions that had become effective prior to January 1, 1986. *See* note 2 *supra*.

15 *See* App. 16 ("WCI made the post-sale payments to fulfill previously fixed contractual obligations. These obligations were

period of § 1369 does not begin to run until the last payment is made, as the court of appeals held, the effective-date provision means that Congress imposed this new liability even where the sale of the business had been completed *more* than five years earlier.

Although Congress might well be constitutionally permitted to impose such liability upon adequate justification under the governing standards, the imposition is plainly retroactive: it adds substantive new burdens based on past conduct -- here, the pre-sale ownership of the business and employment relationship. *See, e.g., Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984) (retrospective pension liability); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (same). Under the "very strong" presumption against reading statutes to impose such retroactive liabilities (*United States Fidelity & Guar. Co. v. United States*, 209 U.S. 306, 314 (1908)), the "becomes effective" language of § 1369 must not be read to produce that result unless there is no other fair reading available. But the Third Circuit did not, and could not, assert that its reading is the only possible one or is in any way compelled by the text (or by specific legislative history). To the contrary, as already shown, § 1369's language not only can be read, but is much more naturally read, to refer to the closing date of the sale of a business. The Third Circuit's ruling thus needlessly renders § 1369 retroactive, in violation of the repeatedly reaffirmed presumption against retroactivity.[16]

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not contingent on a future event or renegotiated after the sale. . . . [T]hese payments were part and parcel of the purchase and sale agreement").

16 The continuing vitality and scope of the presumption is currently at issue in this Court in *Landgraf v. USI Film Products*, No. 92-757, and *Rivers v. Roadway Express, Inc.*, 92-938, argued on October 13, 1993. The present petition should, at a minimum,

B. The Third Circuit Developed an Arbitrary and Uncertain Rule for Applying § 1369's Five-Year Limitation Period

The rule that the Third Circuit developed to cure § 1369's supposed ambiguity is itself both arbitrary and uncertain. First, the Third Circuit's rule cannot be applied in a sensible fashion to economically identical transactions. If, in a transaction similar to the WCI-BKC sale, a seller instead contributed $20 million to the new sponsor at the time of the sale, to be used by the new sponsor to make annual $4 million payments to the plan over the succeeding five years, the transaction would not come within the Third Circuit's rule. The transaction would have "become effective" when the initial (and only) financial contribution was made by the seller to the transferred pension plan, and § 1369's five-year period would not be extended. A seller could thus prop up an underfunded plan for five years yet not come within the Third Circuit's rule. The Third Circuit's attempt to impose liability on predecessor sponsors turns not on any meaningful rationale, but on the happenstance of the date of the last economic interaction between buyer and seller.

Second, the Third Circuit's rationale for extending the five-year period is not limited to post-closing payments to transferred plans. Under the Third Circuit's opinion, § 1369's five-year safe harbor can arguably be ignored any time the seller provides any type of economic support to the buyer. Thus, for example, sellers who finance a buyer or subsequently buy products from, or engage in other transactions with, a division that was sold will expose themselves to claims by the PBGC that they are economically supporting the purchaser.[17] The Third

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be held for consideration in light of this Court's decision in those cases.

17 These are not fanciful conjectures. In *In re Doskocil Cos., Inc.*, 130 B.R. 858 (Bankr. D. Kan. 1991), the PBGC went so far as to

Circuit's rationale would create such uncertainty that it could render § 1369's five-year limitation practically meaningless.

C. The Balance Struck By Congress in § 1369 Makes It Inappropriate and Unwise for the Court to Extend § 1369's Explicit Five-Year Rule

The Third Circuit speculated about the legislative intent of § 1369's bright-line five-year rule, and then, rather than enforcing it, interpreted § 1369 to extend the five-year period in order to achieve the supposed legislative purpose. In second-guessing Congress, the court below failed to heed the Court's admonition against the "assumption of inadvertent omissions" in ERISA's provisions,[18] and that "[t]o supply omissions transcends the judicial function."[19]

The court of appeals' interpretation of § 1369 is explicitly grounded on the erroneous assumption that "By enacting section 1369, Congress codified the *Harvester* predecessor liability rule." App. 13. However, the *Harvester* decision was issued on March 2, 1988, almost two years ***after*** Congress enacted § 1369 onApril

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attempt to impose predecessor liability under § 1369 on the basis of the seller's financial involvement with its former subsidiary that the District Court held constituted nothing more than "simple commercial events without which normal business could not survive." Id. at 868.

18 *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

19 *Sale v. Haitian Centers Council, Inc.*, _ U.S. _ 113 S. Ct. 2549, 2557 n.16 (1993) (quoting *Iselin v. United States*, 270 U.S. 245, 250-51 (1926)).

17, 1986.[20] Consequently, the Third Circuit was clearly mistaken in relying on *Harvester* to find it "reasonable to assume" that Congress intended the five-year rule to be a measure of the economic viability of the new sponsor, and on that basis to devise a new rule that tests the "transferee's economic stability at the time of the transfer." App. 14. Without *Harvester* as an anchor, there is no basis for substituting § 1369's bright-line five-year rule with the Third Circuit's new test of economic stability.

The Third Circuit's analysis of the legislative history clearly illustrates the pitfalls of ignoring this Court's mandate in *Mertens* and instead attempting to divine legislative "purpose." Moreover, the court below, while acknowledging that Congress enacted § 1369 to delineate a safe harbor for employers, App. 13, focused exclusively on the legislative history of another Congressional goal, that of protecting the insurance program. App. 12-13.

The Third Circuit's § 1369(a) interpretation nullifies the bright-line five-year rule prescribed by Congress, without due regard to "the balance between . . . competing goals that the text adopted by Congress has struck." *Mertens*, 113 S. Ct. at 2072 (noting that ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests").

The legislative history of the 1986 amendments to ERISA explicitly states that the amendments, including § 1369, "are the product of nearly 5 years of effort by the members of the Committee on Education and Labor to fashion a workable compromise acceptable to the administrative and other groups representing retirees, organized labor, and the business

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[20] Although WCI brought this error to the court's attention in its Petition for Rehearing, the Third Circuit did not address it.

community." 132 Cong. Rec. H876 (daily ed. March 6, 1986) (statement of Rep. Jeffords).

If, as the Third Circuit suggested, the purpose of § 1369 was to impose liability on *all* predecessor sponsors who transferred pension liabilities onto weaker companies, § 1369 would not contain a bright-line five-year rule limiting predecessor liability. Instead, Congress carefully weighed the competing considerations in crafting a rule for predecessor liability, and specifically intended § 1369 to provide a bright-line five-year rule so that companies that transferred plans would be protected by a "5-year look back limit."[21] By altering that rule, the Third Circuit has created a legal environment in which many employers will not be able to plan the sale of divisions and their related pension plans with any degree of certainty.

The Third Circuit's ruling creates a strong disincentive for unprofitable businesses to be sold with their pension plans intact. Closing a business and selling the assets to pay unfunded liabilities is one way to eliminate or minimize exposure to future liability for unfunded pension benefits. Faced with uncertain and unlimited predecessor liability, a company contemplating the orderly divestiture of divisions or subsidiaries with underfunded pension plans may instead choose plant closings, layoffs and plan terminations as the more prudent course than the uncertainties of divestiture.

D. The Third Circuit's Ruling Fails To Consider The Regulatory Scheme Established By Congress

It is not necessary to distort the statutory language of § 1369 to achieve Congress's goal of protecting the pension

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21 H.R. Rep. No. 99-241, pt.2, *supra*, at 56, 1986 U.S.C.C.A.N. at 714 (emphasis added).

insurance system. Congress, instead of adopting a test of the economic viability of a new sponsor after transfer of a pension plan, as the court below has done, determined that the PBGC was best suited to police the transfer of pension plans.

Thus, under the PBGC regulations, the PBGC must be notified of a transfer of a plan and provided with exhaustive financial and actuarial information regarding the transaction. Therefore, as the District Court properly observed: "Since the PBGC can commence its scrutiny of the transaction at this point and has 5 years in which to decide whether to terminate the transferred plan, Congress' concern with plan sponsors ignoring their pension promises and protection of the insurance program is not impeded." App. 56.

After it receives notice, the PBGC has wide discretionary authority to terminate a plan. If the PBGC determines that "the possible long-run loss to the [PBGC] may reasonably be expected to increase unreasonably if the plan is not terminated," the PBGC may institute termination proceedings. 29 U.S.C. § 1342(a)(4). Here, WCI promptly notified the PBGC of the sale transaction with BKC. However, instead of taking action with respect to the WCI-BKC sale, the PBGC reviewed the transaction, and after two years, notified WCI that "no further action is necessary." Joint Appendix at 151-155. The Third Circuit's rule ignores this framework and relieves the PBGC of its regulatory responsibilities. Congress's purpose is better served by the regulatory scheme it has established than by an arbitrary extension of § 1369's five-year period.

II. THE THIRD CIRCUIT'S HOLDING THAT A COMPLETED ARM'S-LENGTH TRANSACTION WITH ECONOMIC SUBSTANCE MAY BE ATTACKED AS A SHAM IS CONTRARY TO ERISA'S STATUTORY SCHEME OF PREDECESSOR LIABILITY AND IS PERILOUS AND UNSOUND

The Third Circuit correctly upheld the District Court's ruling that WCI's sale of its steel businesses could be found to be a sham only if it "is fictitious or . . . has *no* business purpose or economic effect," App. 19 (emphasis added), *quoting Lerman v. Commissioner of Internal Revenue*, 939 F.2d 44, 53 (3d Cir.), *cert. denied*, _ U.S. _, 112 S. Ct. 590 (1991), and that "[d]isposing of an unprofitable business operation is a legitimate purpose." App. 20. The Third Circuit noted that the *Lerman* test is consistent with the "sole object and accomplishment" test of *Gregory v. Helvering*, 293 U.S. 465, 469 (1935). App. 19-20.

Even if the PBGC were able to allege (which it did not and can not)[22] that WCI's sole motive was to limit its pension liabilities when it sold its steel businesses to Blaw Knox, the PBGC should not be permitted to pursue a claim that the

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22 The amended complaint's only allegation regarding WCI's motivation was that "**A principal goal of the transaction** was to limit WCI's pension liabilities and to dump them on the PBGC." Amended Complaint, ¶ 33, Joint Appendix at 48 (emphasis added). Thus, the PBGC alleges, at most, that WCI's *principal* motivation was to limit its pension liabilities, not that WCI had the required *sole* motivation to do so, and concedes that WCI was at least partially motivated by the legitimate business desire to sell unprofitable businesses. However, the Third Circuit erroneously reversed dismissal of the sham transaction claim on the mistaken ground that "the complaint alleges that WCI was motivated *solely* by a desire to be relieved of pension liabilities." App. 21 (emphasis added). The Third Circuit's holding is simply wrong.

September 1985 sale may be disregarded as a sham. The amended complaint acknowledges that the steel businesses and pension plans actually changed ownership in 1985, and admits that the unaffiliated buyer is still operating the business, albeit at a loss. (Joint Appendix at 44-46; 50). Those acknowledged facts show that the 1985 sale of WCI's businesses to Blaw Knox had a business purpose and meaningful economic effect, and thus preclude the sham theory as a matter of law. *See Cottage Savings Ass'n v. Commissioner of Internal Revenue*, 499 U.S. 554, 111 S. Ct. 1503, 1512 (1991) (where there was "no contention that the transactions in this case were not conducted at arm's length, or that [the seller] retained de facto ownership" of the sold items, the sham transaction doctrine was inapplicable).

The "sole object and accomplishment" standard of *Gregory*, 293 U.S. at 469, and the "no business purpose or economic effect" test of *Lerman*, 939 F.2d at 53, embody the understanding that the purpose and substance of a transaction must be viewed together. If the transaction accomplishes an economic result and has an economic effect, like the September 1985 sale transaction here, that result or effect can not be disregarded and the transaction can not be held to be a sham.[23]

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23 *See Frank Lyon Co. v. United States*, 435 U.S. 561, 583-84 (1978) (in determining that a sale-leaseback would not be disregarded as a sham for tax purposes, the Court held "that where, as here, there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax avoidance features that have meaningless labels attached, the Government should honor the allocation of rights and duties effectuated by the parties"). *Cf. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, _ U.S. _, 113 S. Ct. 1920, 1922-23 (1993)(in assessing the sham exception to the *Noerr-Pennington* doctrine, the lawsuit must be objectively baseless before a court may even examine the litigant's subjective motivation).

Although the Third Circuit paid lip service to the *Gregory* and *Lerman* rules, it allowed the PBGC's § 1362 claim to survive on the bare allegation that the sale was motivated solely by a desire to be relieved of pension liabilities. App. 21. The Third Circuit's decision could be interpreted as changing the "sole object and accomplishment" standard, and reading the "no economic effect" component out of the *Lerman* test. Under the Third Circuit's opinion, a mere allegation of improper motive -- which, standing alone, has never been sufficient to establish a sham[24] -- could not only be used to attack a completed transaction with economic substance, but could also be the basis for literally disregarding that transaction and pretending it never happened.

If the Third Circuit has indeed read the "no economic effect" component out of the sham transaction test, the consequence is to turn § 1362 into a rule for imposing predecessor liability in a bona fide transaction with actual economic effect. The Third Circuit explicitly acknowledged that according to recognized rules of statutory construction, because § 1369 governs predecessor liability, "it would be improper to read an implicit predecessor liability rule into a section [§ 1362]

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24 This Court has only recently reaffirmed that in the tax context, the subjective motivation to avoid a tax by legally "remaining outside the ambit of the law that imposes it is every person's right. '. . . [T]here is nothing sinister in so arranging one's affairs as to keep taxes as low as possible.'" *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2106 n.4 (1992)(*quoting Commissioner v. Newman*, 159 F.2d 848, 850-51 (2d Cir.)(L. Hand, J., dissenting), *cert. denied*, 331 U.S. 859 (1947)). The PBGC's theory is that any transaction in which a seller is motivated by a desire to lawfully limit its pension liabilities is a sham. That novel concept wholly ignores the long-established distinction between the illegal evasion of liabilities and the lawful avoidance of liabilities by structuring one's business to remain outside the law's reach.

that has none." App. 18. Yet, the Third Circuit has done precisely that, despite the fact that Congress has explicity declined to adopt a rule of predecessor liability in § 1362. *See* p.5, *supra*.

Rather, Congress has already established a test for imposing predecessor liability in § 1369 -- if "a principal purpose" of the transaction "is to evade liability" under ERISA, and the plan terminates in five years. Under the Third Circuit's definition, any "sham" transaction would necessarily have a "principal purpose" to evade liability, and would therefore be subject to § 1369. Yet the Third Circuit's "sham transaction" rule of predecessor liability under § 1362 has none of the Congressionally-mandated protections for plan sponsors incorporated into § 1369, such as the five-year safe harbor. The Third Circuit has so confused the state of the law, and may have unintentionally worked such a vast expansion of current law, that guidance from this Court is necessary.

CONCLUSION

For all the foregoing reasons, WCI's Petition for a Writ of Certiorari should be granted. Alternatively, in view of the conflict of the decision below with past decisions of this Court, the Court may wish to consider summary reversal.

DATED: October 26, 1993

Respectfully submitted,

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
(A Partnership Including
Professional Corporations)
One New York Plaza
New York, New York 10004
(212) 820-8000

By: William McGuinness

William McGuinness [WM-7173]*
Attorneys for Petitioner White
Consolidated Industries, Inc.

* Attorney of Record

Of Counsel:

Alexander R. Sussman
Janice Mac Avoy

Daniel R. Elliott, Jr., Esq.
Vice President and General Counsel
WHITE CONSOLIDATED
INDUSTRIES, INC.

APPENDIX

Filed June 30, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3676

PENSION BENEFIT GUARANTY CORPORATION,

Appellant,

v.

WHITE CONSOLIDATED INDUSTRIES, INC.,
c/o CT Corporation SystemsRegistered Agent

On Appeal from the United States District Court
for the Western District of Pennsylvania

(D.C. Civil No. 91-01630)

Argued: May 3, 1993

BEFORE: COWEN, ROTH and ROSENN, Circuit Judges

(Filed June 30, 1993)

George R. Clark
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036

Nancy S. Heermans (Argued)
Pension Benefit Guaranty
Corporation
2020 K Street, N.W.
Washington, D.C. 20006-1806
Counsel for Appellant

Robert S. Garrett
Egler, Garrett & Egler
428 Forbes Avenue
2100 Lawyers Building
Pittsburgh, PA 15219

William G. McGuinness
Alexander R. Sussman (Argued)
Fried, Frank, Harris, Shriver &
Jacobson
One New York Plaza
New York, NY 10004
Counsel for Appellee

OPINION OF THE COURT

COWEN, Circuit Judge.

White Consolidated Industries, Inc. ("WCI") sold a group of unprofitable businesses and their associated underfunded pension plans to a newly formed corporation. WCI, however, remained contractually obligated to make substantial contributions to the plans for five additional years. More than six years after the stated closing date of this sale, the largest of these pension plans terminated. The Pension Benefit Guaranty Corporation ("PBGC"), which is obligated to pay the guaranteed benefits of this plan to the beneficiaries, seeks to recover for these unfunded obligations from WCI, the predecessor employer.

The district court dismissed the PBGC's amended complaint in its entirety. We hold that the PBGC has stated a legally sufficient claim under 29 U.S.C. § 1369 (1988). Section 1369's requirement that a transaction "become [ ] effective" within five years of the plan termination is met because a transaction does not take effect until the previous plan sponsor stops making substantial payments to the pension plans. On the other hand, because section 1369 specifically addresses predecessor liability and applies to this transaction, we will not read an unexpressed predecessor liability rule into 29 U.S.C. § 1362 (1988). Additionally, the PBGC's claim that the transaction at issue is a sham also survives the motion to dismiss. We therefore will affirm in part and reverse in part the order of the district court, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

On September 27, 1985, WCI sold a group of unprofitable businesses and nine associated underfunded pension plans to the newly formed Blaw Knox Corporation. On September 26, 1991, six years later, the PBGC filed a complaint against WCI seeking a declaration that WCI would be liable under 29 U.S.C. §§ 1362, 1369 for the transferred plans' unfunded benefit liabilities if and when they terminated. The PBGC amended its complaint after the largest Blaw Knox pension plan terminated. The amended complaint alleges the following facts, which we accept as true for purposes of this motion to dismiss. See Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993).

WCI is primarily a manufacturer of home appliances. In 1981, WCI owned several unrelated businesses that manufactured steel rolls, metal castings and other industrial equipment (collectively "steel businesses"). The steel businesses had been incurring substantial operating losses for several years and their pension plans were grossly underfunded. WCI unsuccessfully attempted to sell these operations for several years. IN 1984, WCI established a $94 million reserve for disposing of its steel businesses. A significant portion of this reserve corresponded to unfunded pension liability.

Because WCI was unable to sell its steel businesses, it invited the presidents of the businesses' divisions to make offers to purchase their divisions. Several presidents submitted offers with the caveat that WCI retain the associated pension liabilities. WCI rejected these offers.

WCI finally located a buyer willing to assume the pension fund liabilities. On September 27, 1985, WCI sold the steel businesses' assets to a newly formed corporation. Blaw Knox Corporation, which was set up by Cleveland businessman

Robert Tomsich. The purchase and sale agreement required Tomsich to contribute one million dollars in unencumbered capital to Blaw Knox.[1] Aside from this one million dollars, which the PBGC alleges was never paid, Blaw Knox paid no money for the assets of the steel businesses, but merely assumed their liabilities. The only cash exchanged at closing was the $20 million WCI paid Blaw Knox in return for $23 million in accounts receivable WCI retained.

Given Blaw Knox's undercapitalization, the steel businesses' history of operating losses, and the dismal forecasts for the steel industry, WCI knew that Blaw Knox had no reasonable opportunity to meet the pension obligations it assumed. WCI also knew that under amendments to the Employment Retirement Income Security Act ("ERISA") under consideration by Congress, WCI could be liable for the unfunded benefits of the pension plans if the plans terminated within five years of the closing of its deal with Tomsich. Therefore, PBGC alleges that WCI, for the purpose of evading its pension liabilities, structured the transaction to ensure that the Blaw Knox pension plans survived for five years.

To ensure the viability of the plans for five years, the purchase and sale agreement required WCI to contribute four million dollars annually for five years directly to the Blaw Knox pension plans. The contract also required Blaw Knox to pay $1.2 million per year for five years to the plans. In addition, Blaw Knox was contractually obligated to open a $15 million irrevocable letter of credit to indemnify WCI for any liability it might incur relating to the Blaw Knox pension plans, including

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1 The PBGC's complaint did not allege this fact. Because we hold that we may consider the concededly authentic purchase and sale agreement that WCI attached to its motion to dismiss, see infra part II, we include this information in our factual background.

specifically any claim of the PBGC arising from the termination of these plans. Blaw Knox also agreed to indemnify WCI for pension plan liability incurred in excess of the letter of credit. To support the indemnity agreement, WCI retained a security interest in substantially all of Blaw Knox's assets. Termination of any underfunded Blaw Knox pension plan constituted a default under the security agreement and gave WCI the right to repossess all of the assets securing Blaw Knox's Indemnity.

The transaction also protected Tomsich. He received a seventy-eight percent ownership interest in Blaw Knox. Some Blaw Knox managers and executives of Nesco, a diversified holding company of which Tomsich was president, owned the remaining shares. Because Tomsich's interest was less than eighty percent, if the plans failed, Tomsich would not be jointly liable with Blaw Knox under ERISA as part of a control group.

WCI's position would have improved no matter what happened. WCI believed that if the plans failed five years after the deal closed, it would not be responsible for termination liability. If WCI was found liable for the termination liability, however, it could foreclose on virtually all the transferred assets and collect from Blaw Knox under the letter of credit.

From 1986 through 1990, WCI made its annual four million dollar contribution to the plans. Blaw Knox was forced to liquidate assets to meet its annual contractually required $1.2 million contribution. In February 1992, seventeen months after WCI's last contribution to the plans, the largest Blaw Knox plan literally ran out of money. The PBGC therefore had to terminate the plan. See 29 U.S.C. § 1342(a) (1988 & Supp. III 1991) (PBGC must terminate plan that does not have assets available to pay currently due benefits). The unfunded liabilities of this plan are estimated at $82 million. The PBGC is now paying the guaranteed pension benefits to the beneficiaries of this plan. Blaw Knox has not made the 1991 or

1992 contributions to the other Blaw Knox plans, which are currently underfunded by an estimated $20 million.

WCI filed a motion to dismiss the amended complaint in its entirety for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The district court dismissed all five counts of the PBGC's amended complaint. The PBGC appeals the dismissal of Counts I, III, IV and V.

II. DISCUSSION

To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record. See 5A C. Wright & A. miller, Federal Practice and Procedure § 1357, at 299 (2d ed. 1990); Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993); Emrich v. Touche Ross & Co., 846 F.2d 1190, 1198 (9th Cir. 1988). WCI, however, asks us to consider the purchase and sale agreement between WCI and Blaw Knox, which it attached to its motion to dismiss. The PBGC's complaint is based on this contract and describes some of its terms, but the PBGC did not attach the purchase and sale agreement as an exhibit to its complaint.

We previously left open whether a court may properly consider a concededly authentic document upon which the complaint is based when the defendant attaches such a document to its motion to dismiss. See Goodwin v. Elkins & Co., 730 F.2d 99, 104 n.9 (3d Cir.), cert. denied, 469 U.S. 831, 105 S. Ct. 118 (1984). We now hold that a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document. See Cortec Indus., Inc. v. Sum Holding, L.P., 949 F.2d 42, 48 (2d Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1561 (1992); Goodwin, 730 F.2d at 113 (Becker, J., concurring); cf.

Watterson, 987 F.2d at 4 (court did not consider document plaintiff attached in response to defendant's motion to dismiss). Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied. See Goodwin, 730 F.2d at 113 (Becker, J., concurring).

Our decision will not undermine the rationale underlying Rule 12(b)(6)'s requirement that a motion to dismiss be converted to a summary judgment motion if a court considers matters outside the pleadings. The reason that a court must convert a motion to dismiss to a summary judgment motion if it considers extraneous evidence submitted by the defense is to afford the plaintiff an opportunity to respond. See Cortec, 949 F.2d at 48. When a complaint relies on a document, however, the plaintiff obviously is on notice of the contents of the document, and the need for a chance to refute evidence is greatly diminished. See id.

WCI also attached to its motion to dismiss a copy of its notice to the PBGC of the transfer of plan sponsorship and the PBGC's letter in response, stating that "no further action is necessary." App. at 34. At the time the PBGC received information relating to the sale of the pension plans and the financial strength of the new sponsor, it believed that no further investigation was warranted. WCI asserts that this conclusion undermines the PBGC's current contention that Blaw Knox had no reasonable chance of fulfilling the pension obligations it assumed. WCI argues that we should consider this correspondence on a motion for summary judgment because it is a matter of public record. We disagree.

Courts have defined a public record, for purposes of what properly may be considered on a motion to dismiss, to include criminal case dispositions such as convictions or mistrials, see Collins v. County of Kendall, Ill., 807 F.2d 895,

899 n.6 (7th Cir. 1986), cert. denied, 481 U.S. 1023, 107 S. Ct. 1909 (1987), letter decisions of government agencies, see Phillips v. Bureau of Prisons, 591 F.2d 966, 968 (D.C. Cir. 1979), and published reports of administrative bodies, see Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986). WCI asserts that the written exchange between it and the PBGC is a public record because the public may obtain access to it through a Freedom of Information Act ("FOIA") request. See 5 U.S.C. § 552 (1988); 29 C.F.R. §§ 2603.1 - 2603.55 (1992). In the cases cited above, the public had unqualified access to all of the documents at issue. In contrast, potential obstacles exist when one seeks to inspect or copy an unpublished PBGC record. First, one must submit a request to the Disclosure Officer describing the information sought. See 29 C.F.R. §§ 2603.32 - 2603.33. The PBGC may deny the request if it believes the information is not disclosable. See id. §§ 2603.37 - 2603.38. Many categories of information may not be disseminated. See, e.g., id. § 2603.18 (trade secrets and confidential information); id. § 2603.17 (PBGC internal rules); id. § 2603.19 (inter-agency and intra-agency communications); id. § 2603.21 (information compiled for law enforcement purposes). Finally, an applicant may appeal a denial. See id. § 2603.39. Because no FOIA request was made, we do not know if the PBGC would classify these documents as confidential or disclosable. We hold that a document is not a public record for purposes of a motion to dismiss solely because it might be subject to disclosure under FOIA. We therefore will not consider the correspondence between WCI and the PBGC for purposes of this motion to dismiss.

Having decided that we may consider only the purchase and sale agreement in addition to the complaint, we now review the sufficiency of each count of the PBGC's amended complaint. A district court's order dismissing a complaint is subject to plenary review. See Ditri v. Coldwell Banker Residential Affiliates, Inc., 954 F.2d 869, 871 (3d Cir. 1992). We may

affirm the dismissal only if it appears certain the plaintiff can prove no set of facts that would entitle it to relief. Id.

A. SECTION 1369

Counts IV and V of the PBGC's amended complaint allege that WCI is liable for the unfunded pension liabilities of the Blaw Knox plans under 29 U.S.C. § 1369(a) (1988). Section 1369(a) provides in relevant part:

> If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date.

29 U.S.C. § 1369 (emphasis added). Section 1369 was the first statutory provision in ERISA expressly to impose liability on predecessor plan sponsors for terminated single-employer plans.

The PBGC alleges that the principal purpose of WCI's sale of its steel businesses and their attendant pension plans to Blaw Knox was to evade liability. We must credit this contention for purposes of the motion to dismiss. The basis of WCI's Rule 12(b)(6) motion is that the PBGC has not alleged facts that demonstrate that the challenged transaction became effective within five years prior to the termination of any plan. On September 27, 1985, WCI and Blaw Knox signed a

purchase and sale agreement, which stated that "[o]n the CLOSING DATE, BUYER shall adopt and assume each of the ASSUMED PLANS and shall succeed to all rights and obligations of WCI thereunder." App. at 114. Not until February 1992, more than six years later, did the first plan termination occur. The PBGC offers two theories of how the plan terminated within five years of when the transaction became effective.

1.

First, Count IV alleges that WCI's evasive transaction did not become effective for purposes of section 1369 until September 1990, when WCI made its last contribution to prop up the plans. To interpret when WCI's transfer of the pension plans became effective, we begin with the statutory language. Section 1369(a) requires courts to analyze intent at the time the parties "enter[ ] into" the challenged transaction. WCI and Blaw Knox clearly entered into this transaction on September 27, 1985, the day the deal closed. In contrast, the relevant five-year period is measured from the time the transaction "becomes effective." 29 U.S.C. § 1369(a). This different terminology within the same statutory section evidences a congressional intent that a transaction need not "become [ ] effective" on the same day it is "enter[ed] into." Thus, a transaction does not necessarily become effective on the date of closing, as WCI argues and the district court held.

Section 1369 supplies us only with a negative definition of "becomes effective" -- it is not necessarily synonymous with the closing date. The statute does not define the phrase. Therefore, before defining the ambiguous phrase "becomes effective," we must examine the legislative history of section 1369. Statutory language must be analyzed against the background of the statute as a whole and its legislative purpose. Crandon v. United States, 494 U.S. 152, 158, 110 S. Ct. 997,

1001 (1990); United States v. Prudential Ins. Co., 994 F.2d 1149, 1153 (3d Cir. 1991).

Congress made clear that it enacted section 1369 to prevent employers from avoiding liability by simply transferring underfunded pension plans to undercapitalized companies:

> Legislation is also needed to provide an explicit prophylactic rule to protect the [PBGC's] insurance program from companies that transfer large amounts of unfunded benefits to a weaker company or that otherwise attempt to evade liability for their pension promises.
>
> . . . .
>
> The basic policy of the legislation is to limit the ability of plan sponsors to shift liability for guaranteed benefits onto other PBGC premium payers and to avoid responsibility for the payment of certain nonguaranteed benefits to cases of severe business hardship.

H.R. Rep. No. 99-300, 99th Cong., 2d Sess., at 279 (1985), reprinted in 1986 U.S.C.C.A.N. 756, 930; see also H.R. Rep. No. 99-241, pt. 2, 99th Cong., 2d Sess. at 56, reprinted in 1986 U.S.C.C.A.N. 685, 714 ("The Committee hopes that the existence of this explicit statutory provision will deter shifting of pension obligations to very week (sic) companies.").

Prior to the passage of section 1369, a single federal district court had held a predecessor sponsor liable for plan termination costs under a different ERISA section, 29 U.S.C. § 1362 (1988). See In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel, 681 F. Supp. 512 (N.D. Ill. 1988). Section 1362 makes employers at the time of plan

termination liable for the unfunded plan benefits. In Harvester, the court noted that a literal application of section 1362 would permit an employer to avoid liability by simply transferring grossly underfunded pension plans to an insolvent corporation. Even if the plans terminated the very next day, the PBGC would be responsible for paying vested benefits to the appropriate recipients. The Harvester court found that this result, which sanctioned employer abuse of the PBGC insurance system, could not have been intended by Congress. See id. at 523-34. It therefore crafted a rule of predecessor liability to fill an unintended loophole in the statute. The court held that a predecessor employer is liable when it transfers a pension plan that later terminates when: (1) the employer intended to evade pension obligations; and (2) the transferee that assumed responsibility for the plan had economically little chance to succeed. Id. at 525-27.

By enacting section 1369, Congress codified the Harvester predecessor liability rule, see H.R. Rep. No. 99-241, pt. 2, supra, at 55, 1986 U.S.C.C.A.N. at 714 (section 1369 "Incorporates courts decisions under current law"), with one change. The second prong of the Harvester test required the plaintiff to prove that the new employer had no reasonable chance of fulfilling the pension obligations if assumed. In its place, Congress substituted the requirement that the plan terminate within five years of the date the transaction became effective. The PBGC argues that Congress intended to broaden the Harvester predecessor liability rule. WCI, on the other hand, asserts that Congress enacted section 1369 to delineate a safe harbor for employers.

We think Congress did both. Congress apparently believed that if a plan terminated within five years of being transferred, it was fair to assume that the new employer did not have a reasonable chance of succeeding at the time of the transfer. Congress also believed that if a plan remained viable

for five years under a new sponsor, the previous employer should have the benefit of an irrebuttable presumption that the new sponsor had a reasonable chance of fulfilling the pension obligations it assumed. It is reasonable to assume that Congress viewed the amount of time a pension plan survived after a change of sponsorship as reflective of the economic condition of the new sponsor at the time of the transfer. Using this easily quantifiable surrogate, Congress fashioned a bright-line rule.

If a transferor makes substantial post-sale contributions to a pension plan to ensure its viability for five years, however, the plan's existence after five years does not reflect the transferee's economic stability at the time of the transfer. We cannot believe that Congress meant to insulate an employer from predecessor liability in these circumstances. Sanctioning this type of scheme would undermine the stated objective of section 1369 -- to prevent companies from transferring underfunded plans to a weaker company in order to evade liability. See H.R. Rep. No. 99-241, pt. 2, supra, at 32-33, reprinted in 1986 U.S.C.C.A.N. at 690-91. Permitting these actions also would frustrate the broader objective of ERISA as a whole. See id. at 32, reprinted in 1986 U.S.C.C.A.N. at 690 ("The intent of ERISA is that solvent employers pay for the benefits promised to their employees ...."); S. Rep. No. 383, 93rd Cong., 2d Sess., at 1155-56 (employer may not make pension promises with the intent of shifting these obligations to the PBGC).

We therefore hold that a transaction does not become effective for purposes of section 1369 until the company that transferred a pension plan no longer makes substantial pension contributions. See Securities and Exchange Commission Staff Accounting Bulletin No. 30, 6 Fed. Sec. L. Rep. (CCH) § 74,141 at 64,259-60 (1985) (legal transfer of ownership of a business results in a divestiture for accounting purposes only when "the risks and other incidents of ownership have been

transferred to the buyer").[2] Only then is the financial strength of the new employer tested. If the new employer, primarily on its own, is able to sustain the pension plan obligations for five years, then section 1369 immunizes the previous employer from ERISA liability.

We need not define precisely what constitutes substantial contribution by a predecessor employer. In this case, after WCI transferred the pension plans to Blaw Knox, the amended complaint alleges that WCI made annual payments of four million dollars to the plans, while Blaw Knox contributed only $1.2 million annually. This is clearly substantial support from the transferor.[3] Count IV of the PBGC's amended complaint states a claim under 29 U.S.C. § 1369 upon which relief may be granted.

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2 Section 1369 applies "with respect to transactions becoming effective on or after January 1, 1986," Publ. L. No. 99-272 § 11013(b), 100 Stat. 261 (1985). Since we hold that the transaction did not become effective until WCI made the last pension contribution in 1990, section 1369 is applicable to this transaction.

3 The district court found that "the Agreement was clear on its face that legal responsibility for meeting ERISA obligations was assumed by Blaw Knox on the closing date." App. at 23. Although WCI did not have a statutory obligation to fund the plans after the closing, it had a binding contractual obligation to do so. To the extent that WCI made its contractually required payments, it relieved Blaw Knox of its obligation to meet ERISA's minimum funding requirements. Therefore, WCI certainly did have a legal responsibility, albeit by contract rather than statute, to make contributions to the plans.

2.

The PBGC presents a second theory of liability under section § 1369. Count V of its amended complaint alleges that each of WCI's post-sale contributions to the Blaw Knox pension plans was a separate transaction to evade liability. Therefore, the PBGC argues, the payments in 1987 and beyond were individual evasive transactions that occurred within five years to the termination date. To support this argument, PBGC emphasizes that section 1369, by its terms, broadly applies to "any transaction . . . to evade liability." 29 U.S.C. § 1369 (emphasis added).

We agree that Congress did not intend to limit the types of transactions covered to traditional sales of pension funds to another entity. See H.R. Rep. No. 241, pt. 2 supra, at 28-29, 1986 U.S.C.C.A.N. at 686 (purpose of section 1369 is "to protect the [PBGC's] insurance program from companies that transfer large amounts of unfunded benefits to a weaker company or that otherwise attempt to evade liability for their pension promises.") (emphasis added). We also agree that post-sale plan contributions by a previous employer made to prolong the life of a failing plan just until the expiration of the five year limit may qualify as an evasive transaction. In this case, however, WCI made the post-sale payments to fulfill previously fixed contractual obligations. These obligations were not contingent on a future event or renegotiated after the sale. Because these payments were part and parcel of the purchase and sale agreement, we see no reason to analyze each payment in isolation. The district court properly dismissed Count V.

B. SECTION 1362

The PBGC's amended complaint alleges that WCI is also liable under 29 U.S.C. § 1362 as the employer on the date of the plan termination. Counts I and III present two

independent rationales for finding WCI liable under this section. We address each theory in reverse order.

1. Implied Termination

Count III of the PBGC's complaint premises section 1362 liability on the Harvester theory that there is an implied termination of the plan when it is transferred to an undercapitalized entity for the purpose of evading pension obligations. See supra part II.A.1. Assuming without deciding that Harvester properly fashioned a judicial rule of predecessor liability under section 1362, we hold that this theory cannot apply to transactions to which section 1369 applied, i.e., transactions that become effective after January 1, 1986.

Prior to 1986, section 1362 was the only ERISA provision held to impose liability for termination of single-employer plans. In its pre-1986 form, section 1362 contained no specific language holding unaffiliated predecessor sponsors liable when a plan terminated after a change of sponsorship. Nevertheless, the PBGC took the position, which the Harvester court endorsed, that section 1362 could reach predecessor sponsors in certain circumstances. The Harvester court crafted a predecessor liability rule pursuant to section 1362 so that an employer could not avoid liability simply by transferring grossly underfunded pension plans to an insolvent corporation. 681 F. Supp. at 520-24. Because condoning intentional employer abuse of the PBGC insurance system was an absurd result, the Harvester court held that Congress could not have intended that this loophole exist. See id.

For transactions that become effective after January 1, 1986, like the WCI sale of its steel businesses, Congress itself has closed this loophole. Section 1369 articulates a predecessor liability rule with specific requirements. For a predecessor employer to be liable, it must have transferred pension plans

with the intent to evade its pension obligations, and the plans must terminate within five years of when the suspect transaction became effective. 29 U.S.C. § 1369. Section 1362, by its own terms, fails to impose liability on previous employers. Because section 1369 now governs predecessor liability and curbs employer abuse of the PBGC insurance system, it would be improper to read an implicit predecessor liability rule into a section that has none.

When Congress addresses a subject in only one section of a reticulated statute, we assume the decision to omit the topic in another section was intentional. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)). Because section 1369 articulates a rule of predecessor liability and governs the transaction at issue, while section 1362 fails to expressly mention predecessor liability, we will not read a predecessor liability provision into section 1362.

2. Sham Transaction

Count I of the PBGC's amended complaint alleges that WCI's transfer of its pension plan liabilities was a sham transaction designed to avoid pension liability. The sale, the PBGC argues, therefore should be disregarded with respect to pension plan liability and WCI should be held liable under section 1362 as the employer on the date the plan terminated.

The sham transaction doctrine, originally developed in the context of tax cases, dictates that the substance and not the form of a transaction controls the tax consequences triggered by an event. See Diedrich v. Commissioner of Internal Revenue,

457 U.S. 191, 196, 102 S. Ct. 2414, 2418 (1982); Knetsch v. United States, 364 U.S. 361, 367, 81 S. Ct. 132, 135 (1960). This court has defined a sham transaction as one that "is fictitious or . . . has no business purpose or economic effect." Lerman v. Commissioner of Internal Revenue, 939 F.2d 44, 53 (3d Cir.) (quoting DeMartino v. Commissioner of Internal Revenue, 862 F.2d 400, 406 (2d Cir. 1988)), cert. denied, ___ U.S. ___, 112 S. Ct. 590 (1991). The district court cited and applied this definition.

The PBGC first argues that this definition is not authoritative because the Supreme Court has recognized that a transaction may qualify as a sham even if it has a purpose and an effect in addition to tax avoidance. The PBGC relies on Gregory v. Helvering, 293 U.S. 465, 55 S. Ct. 266 (1935), to support this proposition. In Gregory, the taxpayer was the sole shareholder of Corporation A, which held some shares of Corporation B. The taxpayer wanted to transfer the shares of Corporation B to herself, and sell them for a profit. If Corporation A distributed the shares to the taxpayer as a dividend, their value would be taxable as ordinary income. To achieve the same result but receive preferential capital gain tax treatment, the taxpayer formed Corporation C, to receive the shares and then dissolve. Upon dissolution, Corporation C distributed its only asset, the Corporation B shares, to the taxpayer. The taxpayer argued that the transaction should be treated as a corporate reorganization. The Supreme Court held that the transaction was a sham, and should be ignored to calculate the resulting income tax. See Gregory, 293 U.S. at 469, 55 S. Ct. at 267.

The PBGC contends that the transaction in Gregory had dual objectives, to obtain personal profit from the sale of stock and to avoid personal income tax, yet the Court held that it was a sham. Gregory 293 U.S. at 469-70, 55 S. Ct. at 267-68. The Supreme Court explicitly stated, however, that "the sole object

and accomplishment of [the transaction] was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner." Id. at 469, 55 S. Ct. at 267. Therefore the structure of the transaction -- the creation of Corporation C and the elaborate indirect method utilized to move the shares from Corporation A to the taxpayer -- accomplished nothing other than tax avoidance. This court's definition of a sham transaction is consistent with Gregory.

The PBGC argues, in the alternative, that the factual allegations in its complaint are sufficient to support a claim that WCI's sale of its businesses and pension plans had no purpose or effect other than tax avoidance.[4] WCI argues that its sale of the steel businesses and their attendant pension plans was at least partially motivated by a desire to dispose of unprofitable businesses. Disposing of an unprofitable operation is a legitimate business purpose. See Chicagco Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Louis Zahn Drug Co., 890 F.2d 1405, 1412 (7th Cir. 1989) (transaction "designed to relieve [a party] of a part of its business that was producing significant losses" is a bona fide sale).

The PBGC acknowledges that the steel businesses were losing a significant amount of money each year. It is unclear from the pleadings, however, whether or not getting rid of these operating losses was a factor in WCI's decision to sell the businesses and pension plans. WCI's contention that one

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[4] PBGC contends that we should analyze whether the transfer of the pension plans, and not the entire transaction, was a sham. It is undisputed that at least part of the consideration Blaw Knox gave for the assets of the steel businesses was its assumption of the pension liabilities. Therefore, the sale of the businesses and the pension plans are intertwined and we cannot analyze them separately.

objective of the sale was to dispose of an unprofitable operation is undermined by the allegation that it summarily rejected any offer to buy the businesses that required it to retain the pension plan liabilities. Because the complaint alleges that WCI was motivated solely by a desire to be relieved of pension liabilities, the PBGC's claim that the transfer was a sham will survive the motion to dismiss.

III. CONCLUSION

For the foregoing reasons, we will affirm in part (the dismissal of Counts III and V) and reverse in part (the dismissal of Counts I and IV) the order of the district court, and remand for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed June 30, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3612

THE BLAW KNOX RETIREMENT INCOME PLAN,
BLAW KNOX PENSION PLAN, BLAW KNOX
IAM PENSION PLAN, BLAW KNOX
EQUIPMENT PENSION PLAN,
BLAW KNOX DURALOY PENSION PLAN
FOR SALARIED EMPLOYEES
BLAW KNOX DURALOY HOURLY PENSION PLAN
and FIDUCIARIES DEAN G. WILSON and
RICHARD A. MCINTYRE,

Appellants

v.

WHITE CONSOLIDATED INDUSTRIES, INC.,
and JOHN DOE(S)

On Appeal from the United States District Court
for the Western District of Pennsylvania

(D.C. Civil Action No. 91-01629)

Argued on May 3, 1993

Before: COWEN, ROTH and ROSENN, *Circuit Judges*
(Opinion Filed: June 30, 1993)

J. Frank McKenna, III, Esquire
(Argued)
Kenneth R. Bruce, Esquire
Anne E. Mulgrave, Esquire
Babst, Calland, Clements & Zomnir,
P.C.
Two Gateway Center
Pittsburgh, PA 15222
Attorneys for Appellants

Robert S. Garrett, Esquire
Egler, Garrett & Egler
428 Forbes Avenue
2100 Lawyers Building
Pittsburgh, PA 15219

William McGuinness, Esquire
(Argued)
Alexander R. Sussman, Esquire
Audrey M. Samers, Esquire
Fried, Frank, Harris, Shriver &
Jacobson
One New York Plaza
New York, NY 10004
Attorneys for Appellees

OPINION OF THE COURT

ROTH, *Circuit Judge*:

This is a companion case to No. 92-3676, *Pension Benefit Guar. Corp. v. White Consolidated Indus., Inc.*, __F.2d __ (3d Cir. 1993). The Blaw Knox Pension Plans and their fiduciaries (the "Plans") filed a complaint in the United States District Court for the Western District of Pennsylvania against White Consolidated Industries ("WCI") on the same day as the Pension

Benefit Guaranty Corporation (the "PBGC") brought its above-captioned action against WCI. The Plans' amended complaint includes allegations against WCI that are also contained in the PBGC's complaint. Therefore we issue our opinion in this case simultaneously with our opinion in the related action.[1]

This case arises from WCI's transfer of a group of unprofitable businesses and their nine associated underfunded pension plans to the Blaw Knox Corporation ("BKC"). The Plans filed a five count amended complaint on November 19, 1991, six years after WCI's transfer of the plans to BKC. The amended complaint alleged that the transaction resulted in: a breach of fiduciary duty by WCI in violation of section 404 of ERISA, 29 U.S.C. § 1104, a prohibited transaction in violation of section 406, 29 U.S.C. § 1106, interference with the Plans' participants' pension rights in violation of section 510, 29 U.S.C. § 1140, an improper termination under section 4062, 29 U.S.C. § 1362, and a transaction to evade liability under section 4069, 29 U.S.C. § 1369.

WCI filed a motion to dismiss all five counts of the complaint and a motion for summary judgment on Counts I, II, and III. The district court entered a memorandum opinion dismissing all five counts of the Plans' complaint and denying as moot WCI's motion for summary judgment. We hold that the Plans have stated a legally sufficient claim for relief in Count V, under 29 U.S.C. § 1369. Therefore, we will affirm in part and reverse in part the district court's order and will remand for further proceedings consistent with this opinion.

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[1] Our opinion in the related action is hereafter referred to as "the PBGC Opinion." The facts set forth in the PBGC Opinion also apply to this case.

I.

The Plans are six employee pension benefit plans within the meaning of § 3(2)(A) of ERISA, 29 U.S.C. § 1002(2)(A), and two of the Plans' fiduciaries within the meaning of § 3(21) of ERISA, 29 U.S.C. § 1002(21).[2] Among other locations, the Plans are administered in Pittsburgh, Pennsylvania. The appellee, WCI, is a Delaware corporation conducting business throughout the United States.

The Plans filed their complaint on September 26, 1991 and their amended complaint on November 15, 1991. We accept as true the following allegations contained in their amended complaint in light of WCI's motion to dismiss. *See Holder v. City of Allentown*, 987 F.2d 188, 194 (3d Cir. 1993).

Prior to September 27, 1985, WCI owned eight divisions[3] (the "BK Divisions") that manufactured steel rolls, metal castings and other industrial equipment for steel mills. Employees of the BK Divisions were participants in and earned pension benefits under the plans. On September 27, 1985, WCI sold the BK

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2 The Plans are composed of the Blaw Knox Retirement Income Plan, the Blaw Knox Pension Plan, the Blaw Knox IAM Pension Plan, the Blaw Knox Equipment Pension Plan, the Blaw Knox Duraloy Pension Plan for Salaried Employees, and the Blaw Know (sic) Duraloy Hourly Pension Plan. The Plans' fiduciaries are Dean G. Wilson and Richard A. McIntyre.

3 The BK Divisions consisted of the Blaw-Knox Executive Divisions, the Blaw-Knox Casting Division, the Blaw-Knox Rolls Division, the Blaw-Knox New Machinery Division, the Blaw-Knox Equipment Division, the Duraloy Blaw-Knox Division, the Aetna-Standard Divisions and the Blaw-Knox Food & Chemical Equipment Divisions.

Divisions and the associated plans to the newly formed BKC. The Plans maintain that at the time of the negotiation of the sale, BKC was unable to make the contributions to the plans due under ERISA's minimum funding requirements. Furthermore, the Plans assert that it was unlikely then and at any time in the future that BKC would be able to make the required plan payments.

The Plans allege that one of WCI's principal purposes in selling the BK Divisions was to avoid WCI's liability for the plans' unfunded benefits. Through the sale, WCI shifted that liability to BKC. The Plans charge that, as part of the negotiations of the sale, WCI understated the amount of the plans' unfunded liabilities and that BKC relied on the alleged understatement when it decided to purchase the assets of the BK Divisions. The Plans assert that BKC paid no money for the assets of the BK Divisions, but assumed WCI's unfunded plan obligations as consideration for the transfer.

The Plans contend that the pension rights of the plans' participants and beneficiaries were adversely affected as a result of WCI's sale. Additionally, the Plans aver that the Agreement of Purchase and Sale (the "agreement") executed in conjunction with the sale gave WCI control over the plans in certain respects: (a) purportedly requiring that BKC indemnify WCI for any liability arising out of the termination of any of the plans; (b) specifying what contributions BKC would have to make to the plans after the date of the sale; and (c) specifying how BKC was required to use any surplus assets resulting from the termination of any of the plans.

Moreover, the Plans allege that WCI maintained control over the plans through contingency arrangements in the agreements, to wit: either the failure of BKC to meet any of the requirements of the agreements, the termination by BKC of any of the plans that were underfunded, or the assertion of any claim or demand against WCI by BKC relating to the plans constituted events of default permitting WCI to repossess all of BKC's inventory,

accounts receivable and motor vehicles. Additionally, under the agreement BKC established a $15 million letter of credit for WCI's benefit in the event a claim is asserted against WCI relating to the plans.

The Plans charge that, because WCI knew or should have known that BKC would be unable to make the required contributions to fund the plans, WCI agreed to pay $4 million a year to BKC for five years in order to prevent the plans' termination within five years of the sale date. Also as part of the agreement, WCI received from BKC a complete release from any liability connected with the sale or any other of BKC's activities concerning the plans.

The Plans' amended complaint charges WCI with committing the following specific violations of ERISA: breach of fiduciary duty or knowing participation as a non-fiduciary in a fiduciary's breach (Counts I and II), use of the plans' assets in an interested party or self-dealing transaction (Count III), discharging employees for the purpose of interfering with their attainment of rights under the plans (Count IV), and entering into a transaction for the principal purpose of evading pension liability (Count V).

WCI filed a motion to dismiss all five counts of the Plans' amended complaint for failing to state a claim upon which relief could be granted pursuant to Fed. R. Civ. P. 12(b)(6).[4] The

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4 WCI also moved for summary judgment of Counts I, II, and III of the amended complaint on the grounds that those claims were time-barred because the individual plaintiffs had actual knowledge of the alleged breaches and violations more than three years before commencing this action.

district court-granted WCI's motion to dismiss.[5] BKC's timely appeal followed.

II.

The district court had jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1337 and §§ 502(e)(1) and 4070(c) of ERISA 29 U.S.C. §§ 1132(e)(1) and 1370(c). We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review of the district court's dismissal of a complaint under Fed. R. Civ. P. 12(b)(6). We must accept as true all well-pleaded allegations in the complaint and construe all reasonable inferences that can be drawn from the alleged facts in the light most favorable to the Plans. We may affirm the dismissal only if it appears certain that no relief could be granted under any set of facts that could have been proved. *Ditri v. Coldwell Banker Residential Affiliates, Inc.*, 954 F.2d 869, 871 (3d Cir. 1992); *see also* 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1356, at 294 (2d ed. 1990).

III.

A. THE FIDUCIARY CLAIMS

1. Counts I and II

The Plans allege in Count 1 of their amended complaint that WCI breached its fiduciary duty in violation of ERISA

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5 The district judge therefore denied as moot WCI's summary judgment motion in light of the dismissal.

§ 404(a)(1) 29 U.S.C. § 1104(a)(1)[6] when it sold the BK Divisions and transferred the associated pension plans to BKC. Count II derives from Count I and is a claim against non-fiduciaries for knowing participation in a fiduciary's breach of § 404 duties. WCI argues in response that it complied with the specific ERISA provisions governing funding and transfer of pension plan sponsorship and that its decision to sell the BK Divisions and to transfer the pension plans was a business decision not subject to ERISA's fiduciary provisions.

The district court correctly noted that ERISA permits an employer to function as both a plan administrator and a plan sponsor. 29 U.S.C. § 1108(c)(3). In *Payonk v. HMW Indus., Inc.*, 883 F.2d 221 (3d Cir. 1989), we outlined as follows the guidelines for determining whether a corporate management decision falls within the fiduciary function of ERISA:

> [W]here an administrator of a plan decides matters required in plan administration or involving obligations imposed upon

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[6] Section 404 states in relevant part:

> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan *solely in the interest of the participants and beneficiaries* and -
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; ...
>
> (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims ....
>
> 29 U.S.C. § 1104(a)(1) (emphasis added).

> the administrator by the plan, the fiduciary duties imposed by ERISA attach. Where, however, employers conduct business and make business decisions not regulated by ERISA, no fiduciary duties apply. And, when employers wear "two hats" as employers and administrators "... they assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA."

Payonk, 883 F.2d at 225 (citations omitted).

In order to decide whether the district court properly dismissed the Plans' complaint, we must determine whether the complaint sufficiently alleges that WCI was performing a fiduciary and not a corporate function when it transferred the pension plans to BKC. From our review of the facts alleged, we conclude that WCI's decision to transfer the pension plans to BKC was a corporate business decision outside the scope of ERISA's protective rules. The district court concluded as much, therefore, we will affirm the district court's dismissal of Counts I and II.

We find the allegations in Counts I and II of the Plans' amended complaint insufficient for relief to have been granted based upon them, even if taken as true, for the following reasons. In selling the unprofitable BK Divisions and structuring the transaction to include the existing pension plans, the WCI corporate directors were making a corporate business decision. Consequently, WCI was acting in its corporate management role, and not in its role as plan administrator, with respect to the decision to transfer the pension plans. *See Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987) ("It defies common sense to suggest that a corporation must allow a retirement board to make personnel decisions such as determining which plants need fewer employees."), *cert. denied*, 485 U.S. 1022 (1988), *Payonk*, 883 F.2d at 227 ("[T]he decision to terminate the HMW plan could only have been made and effectuated by HMW in its role as

employer. No other party, including . . . HMW as administrator, had the authority to make that decision.").

We think it is significant also, and the district court noted in its memorandum and order, app. at 151, that the Plans do not allege that WCI mismanaged the plans' assets in either Count I or II. ERISA provides that "a person is a fiduciary with respect to a plan to the extent [that] he exercises any discretionary authority or discretionary control respecting *management of such plan* or exercises any authority or control respecting *management or disposition of its assets*." 29 U.S.C. § 1002(21)(A) (Supp. 1993) (emphasis added). Thus, ERISA's definition provides the contours of the exercise of fiduciary duties regarding plan administration and contains the elements that the Plans would necessarily have to allege in order to state a legally sufficient breach of fiduciary duties claim. As the district court concluded, app. at 152, the Plans erroneously relied on decisions that "pertain to actions by plan administrators regarding management of plan assets or plan administration that were allegedly taken for business reasons and [do] not address action taken by employers in their corporate management capacity. (citations omitted)."

Secondly, section 208 of ERISA imposes breach of fiduciary liability if the plan sponsor does not comply with the statutory funding obligations attendant upon a plan's merger,

transfer or acquisition." 29 U.S.C. § 1058 (1982).[7] In its amended complaint, the Plans do not allege that WCI violated any of these provisions when it transferred the pension plans to BKC. The Plans do aver, however, that WCI breached its fiduciary duties by executing an alleged scheme to avoid unfunded pension liability by transferring the plans to BKC, an uncapitalized buyer. With respect to this allegation, the district court held, and we agree, that this claim is insufficient because "[WCI's] compliance with ERISA's provisions for the funding of merged, transferred or acquired pension plans as set forth in 29 U.S.C. § 1058 preclude[s] a finding that a fiduciary breach had occurred." App. at 153; *see also United Steelworkers of Am., Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 198-99 (6th Cir. 1988); *Payonk*, 883 F.2d at 227.

2. Count III

The Plans have alleged in Count III of their amended complaint that WCI violated sections 406(a)(1)(D) and 406(b) of ERISA, 29 U.S.C. §§ 1106(a)(1)(D) and 1106(b).[8] Specifically,

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[7] Section 208 provides that the accrued benefit of any plan participant or beneficiary must not be lower immediately after the effective date of the merger or transfer than it was immediately before such merger or transfer. The PBGC regulations, 29 C.F.R. § 2615.23(a)-(e) (1991), set forth requirements governing the change of corporate sponsorship of a pension plan. These regulations require that WCI provide financial and actuarial information to the PBGC concerning the Plans and their former and current sponsors.

[8] Section 406 states in pertinent part that:

(a) Transactions between plan and party in interest

Footnote continued

the Plans allege that WCI's transfer of the pension plans constituted a direct or indirect transfer of the plans' assets for the benefit of a party in interest and on behalf of a party whose interests were adverse to the interests of the plans' participants and beneficiaries. However, the Plans' allegations in their complaint do not factually state a cause of action under § 406; therefore, we will affirm the district court's dismissal of Count III.

As the district court correctly stated in its memorandum and opinion, "section 406(a) prohibits a plan fiduciary from causing transactions between a plan and a party in interest while section 406(b) bars transactions between a plan and its fiduciary including dealing with a plan's assets in the fiduciary's own interest or on behalf of a party whose interests are adverse to a plan or its participants or beneficiaries." App. at 155.

Footnote continued from previous page

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect -

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

(b) Transactions between plan and fiduciary

A Fiduciary with respect to a plan shall not -

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

As an employer, WCI is by definition a party in interest under 29 U.S.C. § 1002(14)(c) and, as sponsor of the plans, is also a plan fiduciary. By comparison, the Plans do not allege or suggest in their complaint that BKC is a party in interest to this transfer; therefore, without this allegation, section 406 is not implicated by WCI's transfer of the pension plans to BKC. The Plans cite cases concerning transactions involving the investment of plan assets or transactions to which the plan was a party. By contrast, the transfer in this case did not involve the investment or management of plan assets. Rather, there was a change in sponsors of the plans while the plans' assets remained unaffected.

As we have discussed in section III.A.(1), 29 U.S.C. § 1058 specifically provides procedures to properly effect mergers or transfers of pension plans. Since the Plans do not allege that WCI in making the transfer, did not follow the regulations, their claim is inadequate.

B. INTERFERENCE WITH PARTICIPANTS' PENSION RIGHTS

The Plans have alleged in Count IV of their amended complaint that, by selling the BK Divisions and transferring the associated pension plans to BKC, WCI deliberately terminated the plans' participants' employment and interfered with the participants' attaining their pension rights in violation of section 510 of ERISA, 29 U.S.C. § 1140.[9] WCI contends that

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[9] Section 510 provides in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, ... or for the purpose of interfering with the attainment of any right to

Footnote continued

its transfer of the plans does not amount to an interference with pension rights under section 510 because the participants' rights under the plans remained the same before and immediately after the sale of the BK Divisions to BKC. The district court correctly stated and applied the law regarding section 510 in its memorandum and order. For the reasons stated in its order, app. at 157-59, we conclude that the Plans do not allege sufficient facts to sustain a claim for relief under section 510 and will therefore affirm the district court's dismissal of Count IV.

The prohibitions of section 510 are primarily aimed at preventing unscrupulous employers from discharging or harassing their employees to prevent them from attaining their vested pension rights. *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980). In addition, section 510 was designed "to protect the employment relationship that gives rise to an individual's pension rights." *Id.* Furthermore, the sale of an ongoing business is not prohibited by section 510. *See Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). The anti-discrimination language of section 510 is aimed at protecting individual rights rather than the overall financial integrity or financial security of pension funds. *West*, 621 F.2d at 246. Section 510 protects against actions by employers which actions are taken for the purpose of interfering with attainment of pension eligibility. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987).

In this case, WCI's sale of the BK Divisions and transfer of the plans did not affect the participants' eligibility for benefits under the plans as the Plans have alleged. Although there was a

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> which such participant may become entitled under the plan . . . . 29 U.S.C. § 1140.

change in employers, the employees who were participants in the plans prior to the sale continued their participation immediately after the sale. It was only the plans' sponsorship that was altered while the participants' rights under the plans remained unchanged.

C. COUNT V

In Count V of their amended complaint, the Plans seek relief under § 4070 of ERISA, 29 U.S.C. § 1370, based on allegations that WCI violated ERISA sections 4062 and 4069, 29 U.S.C. §§ 1362 and 1369. On February 18, 1992, seventeen months after WCI's last contribution to the plans, the Blaw Knox Pension Plan ("Plan 003") literally ran out of money. As a result, the PBGC terminated Plan 003. 29 U.S.C. § 1342(a) (the PBGC must terminate plan that does not have assets available to pay currently due benefits). The unfunded liabilities of Plan 003 are estimated to be $82 million. The PBGC is now paying the guaranteed pension benefits to the beneficiaries of Plan 003. To date, BKC has not made the 1991 or 1992 contributions to the other plans, which are currently underfunded by an estimated $20 million.

The Plans allege in Count V that the beneficiaries under Plan 003 will lose certain pension benefits not guaranteed by the PBGC to which they are or would otherwise be entitled under the terms of the plan. The substance of the Plans' claims and arguments in Count V are identical to those raised and argued by the PBGC in its Counts IV and V in the related action. Therefore, our treatment of the Plans' allegations in Count V receives the same treatment of Counts IV and V in the PBGC Opinion.

We held in the PBGC Opinion that the PBGC had stated a legally sufficient claim against WCI under 29 U.S.C. § 1369.[10] We decided that section 1369's requirement that a transaction "become[ ] effective" within five years of the plan termination is met because a transaction does not take effect until the previous plan sponsor ceases making substantial payments to the pension plans. We also held that the PBGC did not state a legally sufficient cause of action against WCI under 29 U.S.C. § 1362.[11] We reasoned that because section 1369 specifically addresses predecessor liability and applies to the WCI-BKC transaction, we

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10 Section 1369(a) provides in relevant part:

> If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle *and the transaction becomes effective within five years before the termination date* of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date.
>
> 29 U.S.C. § 1369 (emphasis added).

11 Section 1362(a) provides in relevant part:

> In any case in which a single-employer plan is terminated in a distress termination under section 1341(c) of this title or a termination otherwise instituted by the corporation under section 1342 of this title, any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability under this section.
>
> 29 U.S.C. § 1362(a).

would not read an unexpressed predecessor liability rule into section 1362.

For the reasons stated in the discussion and application of the law of sections 1369 and 1362 in the PBGC Opinion prepared by Judge Cowen, *see* the PBGC Opinion Typescript at 10-24, which we adopt as the opinion of the court, we will reverse the district court's order dismissing Count V of the Plans' amended complaint.

IV.

For the foregoing reasons, we will affirm in substantial part (the dismissal of Counts I, II, III and IV), but will reverse in one part (the dismissal of Count V) the order of the district court and remand for further proceedings consistent with this opinion and the PBGC Opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

PENSION BENEFIT GUARANTY
CORPORATION,

Plaintiff,

vs. Civil Action No. 91-1630

WHITE CONSOLIDATED
INDUSTRIES, INC.,

Defendant.

MEMORANDUM AND ORDER

BARRON P. McCUNE, Senior District Judge
September 11, 1992.

We consider a motion to dismiss the Amended Complaint of the Pension Benefit Guaranty Corporation ("PBGC") filed by the defendant White Consolidate Industries, Inc. ("WCI"). Our jurisdiction is pursuant to § 4003(e)(3) of the Employment Retirement Security Act of 1974, as amended, ("ERISA"), 29 U.S.C. § 1303(e)(3). This action is related to a separate action, The Blaw Knox Retirement Income Plan, et al., v. White Consolidated Industries, Inc., et al., Civil Action No. 91-1629.

This action arises under Title IV of ERISA, 29 U.S.C. § 1301, et seq. The PBGC seeks a judgment of liability against WCI under 29 U.S.C. §§ 1362 and 1369 for unfunded benefit

liabilities under the Blaw-Knox Pension Plan (003). The PBGC also seeks a judgment declaring WCI liable under the same sections of ERISA for unfunded benefit liabilities under the pension plans of the Blaw Knox Corporation (other that Plan 003) if and when they terminate. For reasons set forth below the motion to dismiss will be granted.

I. Facts

The PBGC filed its Complaint on September 26, 1991; and filed an Amended Complaint on March 3, 1992. The following is alleged in the Amended Complaint:

WCI, headquartered in Cleveland, Ohio, is primarily a manufacturer of appliances for the home. In 1986, WCI was acquired by Electrolux AB, a corporation in Stockholm, Sweden. The PBGC is a wholly-owned government corporation that administers the pension plan termination insurance program established by Title IV of ERISA.

Prior to September 1985, WCI owned a group of companies (the "BK Businesses") which were predominately involved in the manufacture of high grade steel rolls, metal castings and other industrial equipment. From 1981 through 1985 WCI was profitable while the BK Businesses were a drain on WCI. Although WCI made efforts to streamline, consolidate, and reduce overhead expenses of the BK Businesses, the Businesses remained unprofitable. Domestic steel mills, a primary customer of the BK Businesses, were experiencing a decline in production with no signs of regaining 1978 production levels.

The nine pension plans ("Plans" or "BK Plans") maintained for the employees of the BK Businesses by WCI allegedly had substantial unfunded pension liabilities. In January 1985, of the 6,941 vested and nonvested participants, less than half of the participants were active employees.

Beginning in 1983 through early 1985, WCI attempted to sell the BK Businesses, but was unsuccessful. At that time WCI was planning to sell the assets and operations of the BK Businesses while retaining the pension liabilities associated with them.

In or around April 1985, WCI began discussing the possibility of a sale with Cleveland businessman Robert J. Tomsich, president of Neco, Inc., Tomsich's privately-owned, diversified holding company. On September 27, 1985 WCI and Tomsich entered into an Agreement of Purchase and Sale and related Agreements (the "Agreements") wherein WCI sold the BK Businesses to Blaw Knox Corporation ("BKC"), a corporation created for purposes of the transaction. The Agreements provided for the transfer of substantially all the assets and liabilities of the BK Businesses to BKC including assumption by BKC of all pension liabilities for retirees and current employees of the Businesses. Apart from its assumption of liabilities, BKC paid nothing for the assets of the BK Businesses.

In the spring and summer of 1985, WCI was aware of a bill pending before Congress (ultimately enacted as 29 U.S.C. § 1369(a)) which provided for predecessor liability where a plan terminated within five years of the date of sale. WCI structured the transaction so that the transferred Plans would not terminate within five years of the sale. The transfer of the BK Businesses was an attempt to evade ERISA's restrictions and have the PBGC absorb the pension liabilities.

The Agreements required WCI to make contributions of $20 million directly to the BK Plans in five annual installments beginning in September 1986. Without these annual payments, BKC would have been unable to make Plan contributions and remain in business and the Plans would have terminated within five years of the sale. The Agreements provided that BKC was

to contribute a minimum of $1.2 million to the Plans for five years.[1]

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[1] According to the Amended Complaint, the Agreements provided as follows:

> "(a) BKC received virtually all the assets of the Blaw Knox Businesses, including real estate, plants, equipment, finished goods and raw materials inventories, trademarks and patents.
>
> (b) BKC assumed all liabilities of the Businesses, including all underfunded pension plans for retirees and current employees of the Blaw Know Businesses, as well as retiree and current employees' medical and life insurance benefits.
>
> (c) The seller WCI paid the buyer BKC $20 million in cash at closing. WCI retained the accounts receivable totalling approximately $23 million.
>
> (d) BKC was required to open an irrevocable letter of credit in favor of WCI in the amount of $15 million to indemnify WCI against, inter alia, any claims for pension liabilities. The amount of the letter of credit could be reduced in annual increments, starting no sooner than 42 months after the closing of the transaction.
>
> (e) Pursuant to an irrevocable assignment from BKC to the Blaw Knox Plans, which on information and belief was required by WCI, WCI would continue to make contributions directly to the Blaw Knox Plans in the total amount of $20 million in five equal installments. WCI also would pay BKC $6 million in three annual installments to fund retiree and life insurance benefits.
>
> (f) BKC indemnified WCI for any claims of liability against WCI with respect to the Blaw Knox Plans. The Purchase and Sale Agreement provided in pertinent part:
>
> > 'Buyer shall be fully responsible for and shall indemnify and hold WCI harmless against any and all liability, obligation, expense loss, tax or penalty

BK is currently operating at a loss with little operating cash and no available credit. On February 18, 1992, Plan 003 was terminated effective February 29, 1992 pursuant to 29 U.S.C. § 1342(a) because it no longer has assets available to pay benefits currently due. BKC has not made its 1992 contribution to the BK Plans which are currently underfunded by an estimated $20 million.

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> for or with respect to (i) any and all benefits under any assumed Plan; . . (iv) the termination of any assumed Plans, including without limitation any and all liability arising under Title IV of [ERISA] without regard to whether such liability is chargeable to Buyer under Title IV.'
>
> This indemnity was secured by substantially all the assets of the Business acquired by BKC.
>
> (g) The termination of any underfunded Blaw Knox Plan constituted a default by BKC under the Security Agreement. Upon default, the contract gives WCI the right to take control of BKC and to repossess all the assets that BKC had pledged to secure its indemnity of WCI.
>
> (h) BKC was required to contribute at least a minimum amount of $1.2 million per year to the Blaw Knox Plans for each of the first five years after the date of the transaction.
>
> (i) A $15 million line of credit for BKC was arranged with Ameritrust Bank, WCI's bank, with BKC's accounts receivable as security. In addition, BKC was required to maintain its pension trust accounts at Ameritrust after the transaction."

Am. Compl. ¶ 25 (emphasis supplied).

II. Discussion

For purposes of this motion to dismiss, all factual allegations in the complaint are accepted as true and all reasonable factual inferences that can be drawn from those allegations must be resolved in favor of the plaintiff. Schrob v. Catterson, 948 F.2d 1402 (3d Cir. 1991).

The Amended Complaint contains 5 counts. Counts I, II and III allege under theories of sham transfer, default and implied termination that WCI is liable to the PBGC as provided in ERISA § 4062, 29 U.S.C. § 1362.

Section 1362 provides that where a "single-employer plan is terminated . . . , any person who is, on the termination date, a contributing sponsor of the plan . . . shall incur liability under this section . . ." 29 U.S.C. § 1362(a) (as amended) ("1986 version"). The version of § 1362 in effect in September 1985 ("pre-1986 version") imposed liability on the employer at the time of termination of a single-employer plan.[2]

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[2] The version of § 1362 in effect in 1985 reads:

> "§ 1362. Liability of employer
>
> (a) Employers covered
>
> This section applies to any employer who maintained a single-employer plan at the time it was terminated, but does not apply ---
>
> . . .
>
> (b) Amount of liability
>
> Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of ---
>
> (1) the excess of ---
>
> . . . "

In 1986 § 1362 was amended as follows:

WCI argues that under the plain meaning of the statute a company that is not a contributing sponsor on the date of termination of a plan cannot be held liable. WCI maintains that since it was not a contributing sponsor to Plan 003 on February 27, 1992, the date of termination, it cannot be found liable under § 1362.

A. COUNT I - Sham Transfer

Under Count I of the Amended Complaint, the PBGC alleges that the 1985 transaction was a sham transfer. The PBGC argues that when the substance of the transaction is considered rather than its form, there was no meaningful economic effect on WCI other than the removal of the Plans' pension liabilities.

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> "§ 1362. Liability for termination of single-employer plans under distress termination or termination by corporation.
>
> (a) In general
>
> In any case in which a single-employer plan is terminated in a distress termination under section 4041(c) or a termination otherwise instituted by the corporation under section 4042, any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's control group shall incur liability under this section. The liability under this section of all persons shall be joint and several. The liability under this section consists of ---
>
> . . . "

Sham transactions normally arise in the context of federal taxation. A sham transaction has been defined as a transaction that "is fictitious or . . . has no business purpose or economic effect other than the creation of tax deductions." De Martino v. Commissioner, 862 F.2d 400, 406 (2d Cir. 1988); Lerman v. Commissioner, 939 F.2d 44, 55 (3d Cir. 1991). However, at least one appellate court has used the concept of a sham transaction when considering liability under ERISA. See Carpenter's Local Union No. 1846 etc. v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983). If the PBGC can demonstrate that the transaction between WCI and BKC was a sham, a disguised continuance used by WCI to evade its obligations under ERISA, the PBGC can succeed on its claims against WCI under § 1362. Id. at 526. We must liberally construe the pleadings to determine whether the transaction between WCI and BKC had economic substance other than evasion of ERISA pension obligations.

BKC paid no money for the BK Businesses. BKC received virtually all of the assets and assumed all of the liabilities of the BK Businesses and the liabilities of the underfunded Plans. WCI paid BKC $20 million in cash for the $23 million in accounts receivable. BKC agreed to make future payments of $20 million into the Plans and $6 million for retiree benefits. BKC agreed to indemnify WCI against pension claims secured by a $15 million letter of credit and the majority of its assets. A $15 million line of credit was arranged for BKC secured by BKC's accounts receivable.

The PBGC argues that the sale of the BKC Businesses had neither a meaningful economic effect on WCI other than to insulate WCI from future pension obligations nor a legitimate business purpose. However, the BK Businesses in the 5 years preceding the sale has sustained significant operating losses exclusive of the required pension plan contributions despite efforts by WCI to improve efficiency of operations. Am.

Compl., ¶¶ 7, 9. Moreover, the forecast for the domestic steel industry, a primary customer of the BK Businesses, was not anticipated to recover to earlier levels. Id., ¶ 10. Therefore, after the sale WCI's position improved economically by its avoidance of future operating losses from the BKC Businesses. Although WCI continued to make pension contributions for five years out of its own operating income (which it would have been required to do had it not sold the BK Businesses and maintained the Plans), it no longer had to absorb the operating losses from the BK Businesses. The economic motivation was more than the alleged avoidance of pension obligations. We see no reason why ridding oneself of an unprofitable operation serves no legitimate business purpose. We conclude that the PBGC has failed to state a claim that WCI was a contributing sponsor under the sham transaction theory in Count I.

B. COUNT II - Default Theory

In Count II the PBGC contends that a default provision in the Security Agreement provides the basis for assessing liability against WCI under § 1362 as an employer maintaining and/or a contributing sponsor of the Plans. Under the default clause, termination of any one of the Plans constituted a default of the entire Agreement and entitled WCI to take possession and control of BKC's assets. Am. Compl., ¶ 51. The PBGC seeks to have WCI found liable for the unfunded liabilities of Plan 003 as of February 29, 1992, as well as for unfunded liabilities for any Plans which are terminated in the future.

The PBGC relies on an Internal Revenue Service ruling for determining whether trades or businesses are under common control. Employees who are under "common control" are treated as if they were employed by a single employer. 29 U.S.C. § 1301(b)(1). The applicable regulation prescribed by the PBGC incorporated by reference § 414(c) of the Internal Revenue Code which reads in pertinent part:

> "Rules for determining ownership.
>
> . . .
>
> (b) Constructive ownership - (1) Options. If any person has an option to acquire an outstanding interest in an organization, such interest shall be considered as owned by such a person. . . .

26 C.F.R. § 1.414(c)-4(b). However, the term "interest" in the case of a corporation is defined as stock. 29 C.F.R. § 1.414(a)-4(a). Since there is no dispute that WCI's security interest is in the assets of BKC, WCI cannot be deemed a constructive owner of BKC through application of § 1.414(a)-4(b).

The result would not change even if WCI's security interest in the BKC assets were considered an "interest" for purposes of § 1.414(c)-4(b). The PBGC agrees that the default provision does not constitute an option until a Plan is terminated. To constitute an option to obtain BKC's assets, the right in question must enable WCI to take possession of BKC's assets presently at its election. For WCI to have the right to possession of BKC's assets, a Plan termination must exist, a condition of which WCI had no control. Therefore, prior to February 29, 1992, BKC did not constructively own the assets of BKC. On or after that date, perhaps BKC could be deemed to constructively own the BKC assets. However, considering that Plan 003 had to be terminated prior to constructive ownership of the assets, WCI cannot be held liable for unfunded liabilities of Plan 003.

C. COUNT III - Implied Termination

WCI contends that (1) the 1986 version of § 1362(a) expressly provides for liability to be imposed solely on the contributing sponsor on the termination date as defined in 29 U.S.C. § 1348(a), (2) the implied termination theory does not apply where the buyer and plans survived longer than five years

after the transaction, and (3) the implied termination theory is legally unsound.

WCI maintains that the 1986 version of § 1362 applies because Plan 003 was terminated on February 29, 1992 pursuant to 29 U.S.C. § 1342(a). Congress made it plain that the 1986 version of § 1342(a) applied to plans which had not been terminated or for which termination proceedings had not been instituted before January 1, 1986. 29 U.S.C.A. § 1341 at 107 (1990) (Note on Effective date and application of amendments made by Title XI of Act, Apr. 7, 1986; temporary procedures). Therefore, the 1986 version should apply to all of the Plans including Plan 003.

The plain language of the 1986 version imposes liability on a person who is a contributing sponsor on the date a plan is terminated by the corporation under section 4042 [29 U.S.C. § 1342]. See n.2, supra. We find nothing ambiguous in this language. The termination date of a single-employer plan is defined as the "date established by the plan administrator and agreed to by the corporation." 29 U.S.C. § 1348(a)(3). There is no suggestion that there can be two termination dates: one implied and the other pursuant to the statute.

The PBGC, while not offering any explanation as to why there should be two termination dates in the case of Plan 003, argues that the pre-1986 version of § 1362 is applicable. The PBGC relies on an implied termination theory set forth in In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel ("Harvester"), 681 F. Supp. 512 (N.D. Ill. 1988), to support its theory of predecessor liability under § 1362(a). Under the pre-1986 version of § 1362 the court in Harvester concluded that "[a]n employer, who with the sale of his business, delegates his pension obligations, is liable if a principal purpose of the sale is to evade pension liability and if, objectively, his buyer lacks a reasonable chance of meeting those obligations." Id. at 526.

In Harvester, International Harvester Company ("IH") sold the assets of its Wisconsin Steel Division in a 100% leveraged buyout to Envirodyne in July, 1977. The title to the assets was held by Envirodyne's newly created Wisconsin Steel Corporation ("WSC"). WSC filed for bankruptcy in March 1980. Since WSC could not pay the unfunded vested pension benefits, the PBGC stepped in and sought funds from IH. On the eve of trial after six years of discovery, IH moved to dismiss the PBGC's complaint.

The Harvester court concluded that some form of predecessor liability existed under § 1362 prior to the 1986 amendments. The decision was based on the legislative history of two statutes: § 1369 and the pre-1986 version of § 1362. As discussed earlier, prior to 1986, § 1362 imposed liability on an employer who maintained a plan at the time of its termination. In 1986, when Congress amended the termination liability provisions of ERISA (also known as the Single Employer Pension Plan Amendments Act of 1986), § 1369(a) was added. Section 1369(a) expressly provided for predecessor liability under certain specified circumstances. Section 1369(a) did not apply to transactions which were effective before January 1, 1986.

From the legislative history of the pre-1986 version of § 1362, the most that can be said is that Congress did not consider the issue of predecessor liability. However, after examination of the legislative history of § 1369, the Harvester court concluded that Congress did not intend for the pre-1986 version of § 1362 to be read literally and that § 1369 was an expression of liability which had existed under the older version of § 1362. One other court has questioned the logic of the

conclusion in Harvester. See In re Doskocil Cos. Inc., 130 B.R. 858 (Bkrtcy. D. Kan. 1991).[3]

While we believe that the natural reading of the pre-1986 version of § 1362 clearly refers to the time of a plan's actual termination, we need to reject the rationale of Harvester. In Harvester, although a time limit for implied termination claims under § 1362 was not defined, the theory of liability contemplated circumstances where an employer transfers "his duties to a pension plan with substantial unfunded liabilities to a buyer who economically had little chance to succeed . . ." Harvester, 681 F. Supp. at 525. As discussed earlier, the Harvester court determined, in part through the legislative history of the passage of § 1369(a) in 1986, that Congress had intended the older version of § 1362 to encompass some form of predecessor liability. Section 1369(a) put a five year limit on exposure to predecessor liability. See infra, p. 11. The Harvester court conceded that the pre-1986 version of § 1362 would have some time-limit for exposure to liability for plan termination. Id. at 525. The buyer, WSC, had filed for bankruptcy within three years of the asset sale. Id. at 515.

If we were to accept without question the validity of the implied termination theory in Harvester, we do not believe it extends to circumstances where the buyer remains in business and the plans have not terminated within five years of the sale. In this case BKC was in the business at the time the Amended Complaint was filed and is still in business. The only plan to have terminated, Plan 003, was not terminated until 6 1/2 years

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3 In Doskocil, while questioning the conclusion in Harvester, the court found it unnecessary to denounce the decision because the seller, unlike IH, was insolvent at the time of the sale of certain of its divisions and there were no facts developed questioning the financial position or expertise of the buyer at the time of the sale.

after the asset sale. The other Plans remain in effect. These facts oppose application of the implied termination theory set forth in Harvester.

D. COUNTS IV AND V - 29 U.S.C. § 1369(a)

In Counts IV and V of the Amended Complaint the PBGC alleges that WCI is liable for unfunded pension benefit liabilities because "the effective date of the transaction between WCI and BKC was no earlier than September 15, 1990, the date of WCI's final contribution to the Blaw Knox Plans" and "[e]ach of [the $4 million annual contributions to the BK Plans by WCI between the years 1986-1990] constituted a transaction within the meaning of 29 U.S.C. § 1369." Am. Compl., ¶¶ 62, 66 and 67.[4] WCI contends that it has no liability under § 1369 because: (1) WCI's sale of assets to BKC occurred prior to the effective date of § 1369; (2) the Plans survived more than five years after the sale of the BK Businesses; and (3) the post-sale contributions by WCI did not constitute evasive transactions within the meaning of § 1369.

Section 1369(a) reads in pertinent part:

> "(a) Treatment of transactions to evade liability. If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be

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[4] Additionally, Counts IV and V of the Amended Complaint contain allegations that WCI is liable for unfunded pension liabilities under 29 U.S.C. § 1362.

> subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date. This subsection shall not cause any person to be liable under this subtitle in connection with such plan termination for any increases or improvements in the benefits provided under the plan which are adopted after the date on which the transaction referred to in the preceding sentence becomes effective."

As noted earlier, the effective date of this subsection was January 1, 1986.

From a plain reading of § 1369, if the "transaction became effective" on the date of the asset sale, September 27, 1985, WCI cannot be found liable since there was no plan termination in the ensuing 5 years. The issues we address are whether the date of WCI's final payment to the Plans constituted the effective date of the transaction (Count IV) and whether WCI's payments to the Plans are separate transactions within the meaning of § 1369(a) (Count V).

On September 27, 1985 BKC assumed virtually all the assets of the BK Businesses and assumed all the liabilities of the Businesses including the Plans. Am. Compl., ¶¶ 23, 25(a), (b). The Agreement of Purchase and Sale expressly provided that on the closing date, September 25, 1985, BKC succeeded to all responsibility for the pension liabilities of the assumed Plans. Elliot Aff. Ex. A, ¶ 6.4.1. The agreements effecting the asset transfer also obligated WCI to pay directly to the transferred Plans a total of $20 million in five annual installments beginning September 15, 1986. Am. Compl., ¶¶ 25(e), 62.

Both parties have cited In re Doskocil Cos. Inc. where the court found that "[a] 'transaction to avoid liability'

contemplates a transfer of responsibility for meeting the funding requirements of ERISA." In re Doskocil Cos. Inc., 130 B.R. at 868. As noted above, the Agreement was clear on its face that legal responsibility for meeting ERISA obligations was assumed by BKC on the closing date.

The PBGC, relying on SEC Staff Accounting Bulletin 40, contends that responsibility for funding under ERISA did not transfer to BKC until WCI's final payment to the Plans was made. In assessing whether legal transfer of ownership of one or more business operations has resulted in a divestiture for accounting purposes the SEC Staff opined that "the principal consideration must be an assessment of whether the risks and other incidents of ownership have been transferred to the buyer with sufficient certainty." SAB 40, Topic 5E, 6 Fd. Sec. L. Rep. (CCH) ¶ 7,141 at 64,259-64,260. "When the facts and circumstances are such that there is a continuing involvement by the seller in the business," it is questionable whether the transaction is a divestiture. Id. at 64, 260. Since the PBGC has made no allegations of any continuing involvement by WCI in BKC's business, WCI's final payment to the Plans did not alter the date of legal transfer of the Plans. Under a plain reading of the Agreement of Purchase and Sale the transfer of the Plans and obligation to meet ERISA's funding requirements occurred September 27, 1985. The final payment to the Plans by WCI in September 1990 did not change the effective date of the transaction at issue, i.e. the asset sale and transfer of the assumed Plans, because WCI was not responsible under ERISA for meeting the assumed Plans' funding. WCI was neither an employer nor a plan sponsor after September, 1985. Since the asset sale occurred prior to the effective date of § 1369(a), the PBGC has failed to state a cause of action under Count IV.

In Count V, the PBGC alleges that each of WCI's annual $4 million payments to the Plans beginning in September 1986 and ending September 1990 was a transaction under

§ 1369. Under this theory WCI could be liable for any plan termination occurring prior to September 15, 1995.

We do not believe that the individual payments to the Plans made pursuant to the 1985 asset sale constituted separate transactions to evade liability within the meaning of § 1369. The obligation to make these payments was incurred by WCI as part of the asset sale on the closing date. There are no allegations that the payments were contingent on a future event nor that there were any subsequent renegotiations of the payment obligations between BKC and WCI. The amount of the payments remained constant regardless of any fluctuation in the actual liabilities of the Plans. WCI was merely fulfilling its contractual obligations which were fixed at the time of closing.

Section 1369(a) expressly provides that for any person found liable as the result of the plan termination, such person is not responsible for any enlargement of plan benefits which occurred after the transaction becomes effective. If payments to plans by a seller in the same circumstances as WCI were to be viewed as separate transactions, then the seller could be found liable for promises made post-closing by the buyer. This result contradicts the plain language of the statute.

The PBGC argues that Congress' intent in enacting § 1369(a) was to protect the PBGC's insurance program from companies who foist unfunded benefits onto a weaker company or in other ways attempt to escape liability for their pension promises. However, it was also Congress' intention to limit exposure to liability under § 1369(a) to five years after the transaction. H.R. Rep. No. 241, 99th Cong., 1st Sess., Pt. 2 at 56 (1985), reprinted in 1986 U.S.C.C.A.N. 685, 714. If a seller's post-sale contributions were to extend the effective date of the transaction, then the five-year limitation would become, for most purposes, meaningless. See Doskocil, 130 B.R. at 868-869.

Under the PBGC's regulations a reportable event occurs when a transaction, involving a transfer of assets of a single-employer plan which is not funded of $1 million or more, results in a new contributing sponsor. 29 C.F.R. § 2615.23(a). Notice of this reportable event must be filed with the PBGC within 30 days of its occurrence. 29 C.F.R. § 2615.3(a). In addition to required information in the notice which includes financial information, the PBGC may require submission of additional information. 29 C.F.R. § 2615.3(d). Since the PBGC can commence its scrutiny of the transaction at this point and has 5 years in which to decide whether to terminate the transferred plan, Congress' concern with plan sponsors ignoring their pension promises and protection of the insurance program is not impeded.[5] [6]

Accordingly, we find that the PBGC has failed to state a claim for liability under § 1369(a) in Count V of the Amended Complaint. To the extent the PBGC has alleged a cause of action under § 1362 in Count IV or V, for reasons stated in discussion of Counts I, II and III, supra, we hold there is not claim against WCI.
An order follows.

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5 The PBGC has wide discretionary authority to terminate a plan. For example, if the PBGC determines that "the possible long-run loss of the [PBGC] may reasonably by expected to increase unreasonably if the plan is not terminated", the PBGC may institute termination proceedings. 29 U.S.C. § 1342(a)(1).

6 Notice of the transfer of the Plans from WCI to BKC was sent to the PBGC on or about October 25, 1985. In July 1987 the PBGC accepted the notice as filed and determined that no further action was necessary.

/s/ Barron P. McCune
BARRON P. McCUNE
SENIOR UNITED STATES DISTRICT JUDGE

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

THE BLAW KNOX RETIREMENT INCOME PLAN, BLAW KNOX PENSION PLAN, BLAW KNOX IAM PENSION PLAN, BLAW KNOX EQUIPMENT PENSION PLAN FOR SALARIED EMPLOYEES, BLAW KNOX DURALOY HOURLY PENSION PLAN and FIDUCIARIES DEAN G. WILSON and RICHARD A. McINTYRE,

Plaintiffs,

Civil Action
No. 91-1629

vs.

WHITE CONSOLIDATED INDUSTRIES, INC. and JOHN DOE(s),

Defendants.

MEMORANDUM AND ORDER

BARRON P. McCUNE, Senior District Judge
September 11, 1992.

We consider a motion to dismiss and a motion for summary judgment filed by a defendant, White Consolidated Industries, Inc. ("WCI"). Our jurisdiction is pursuant to 28 U.S.C. §§ 1331 and 1337 and §§ 502(e)(1) and 4070(c) of the Employment Retirement Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1132(e)(1) and 1370(c). This action is related to a separate action, Pension Benefit Guaranty

Corporation v. White Consolidated Industries, Inc., Civil Action No. 91-1630.[1] For reasons set forth below the motion to dismiss will be granted. The motion for summary judgment will be denied as moot.

I. FACTS

Plaintiffs are six employee pension benefit plans (the "Plans") and two of the Plans' fiduciaries.[2] Defendants John Does are one or more unnamed persons who are or were employed by or associated with WCI who allegedly exercised discretionary authority with respect to the management or administration of the Plans or their assets or who acted in concert with persons who exercised discretionary authority with respect to the Plans.

According to the Amended Complaint, prior to September 27, 1985, WCI owned eight divisions which we shall

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1 We have filed a Memorandum and Order today in the related action which is hereafter referred to as the "PBGC Opinion". The facts are more fully set forth in that opinion to which reference is made.

2 The Plans are composed of the Blaw Knox Retirement Income Plan, the Blaw Knox Pension Plan, the Blaw Knox IAM Pension Plan, the Blaw Knox Equipment Pension Plan, the Blaw Knox Duraloy Pension Plan for Salaried Employees, and the Blaw Knox Duraloy Hourly Pension Plan. The plaintiff fiduciaries are Dean G. Wilson and Richard A. McIntyre.

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refer to as the Blaw-Knox Divisions or simply "BK Divisions."[3] Employees of the BK Divisions were participants and earned benefits under the Plans. On September 27, 1985, WCI sold the BK Divisions and Plans to Blaw Knox Corporation ("BKC") which Plaintiffs allege was in violation of various provisions of ERISA.

Plaintiffs assert that BKC paid no money for the assets of the BK Divisions, but assumed the unfunded obligations of WCI to the Plans. Plaintiffs allege that a principal purpose of selling the BK Divisions was to avoid WCI's liability for the Plans' unfunded benefits and shift that liability to BKC, a corporation which Defendants allegedly knew or should have known would be unable to pay. Plaintiffs charge that as part of the negotiations of the sale of the BK Divisions, Defendants understated the amount of the Plans' unfunded liabilities and that BKC relied on the alleged understatement when it decided to purchase the assets of the BK Divisions. Additionally, Plaintiffs aver that the Agreement of Purchase and Sale and Irrevocable Assignment (collectively referred to as "Agreements") executed in conjunction with the sale of the BK Divisions gave WCI control over the Plans in certain respects.

Plaintiffs filed their Complaint on September 26, 1991 and filed an Amended Complaint on November 19, 1991. As of the filing of Plaintiffs' Memorandum of Law in Opposition to the within motion on February 28, 1992, none of the Plans had been terminated. However, on February 18, 1992, the Blaw-Knox

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3 The BK Divisions consisted of Blaw-Knox Executive Divisions, Blaw-Knox Casting Division, Blaw-Knox Rolls Division, Blaw-Knox New Machinery Division, Blaw-Knox Equipment Division, Duraloy Blaw-Knox Division, Aetna-Standard Divisions and Blaw-Knox Food & Chemical Equipment Divisions.

Pension Plan ("Plan 003") was terminated effective February 29, 1992 pursuant to 29 U.S.C. § 1342(a).

The Amended Complaint charges Defendants with the following violations of ERISA: breach of fiduciary duty or knowing participation as a non-fiduciary in a fiduciary's breach (Counts I and II), use of the Plans' assets in an interested party or self-dealing transaction (Count III), discharging employees for the purpose of interfering with their attainment of rights under the Plans (Count IV), and entering into a transaction for the principal purpose of evading pension liability (Count V).

II. DISCUSSION

In deciding a motion to dismiss for failure to state a claim, all factual allegations in the complaint are to be accepted as true and all reasonable factual inferences that can be drawn from those allegations must be drawn in favor of plaintiffs. Schrob v. Catterson, 948 F.2d 1402 (3d Cir. 1991).

A. THE FIDUCIARY CLAIMS

The first three counts of the Amended Complaint contain allegations that WCI breached its fiduciary duty under ERISA.

1. Counts I and II

Count I of the Amended Complaint alleges that WCI's sale of the BK Divisions and transfer of the associated Plans to BKC was a breach of fiduciary duty in violation of ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). Count II is a derivative of Count I against non-fiduciaries for knowing participation in a

fiduciary's breach of § 404 duties.[4] Section 404(a)(1) of ERISA requires fiduciaries to act "solely in the interest of the participants and beneficiaries" of the plan, "for the exclusive purpose" of providing benefits to them, and "with the care, skill, prudence, and diligence" of a "prudent man acting in a like capacity and familiar with such matters." 29 U.S.C. § 1104(a)(1).

WCI makes two arguments that the sale of the BK divisions and concomitant transfer of the Plans covering the employees of those divisions was not a breach of fiduciary duty under ERISA: (1) ERISA's statutory obligations were satisfied by WCI's compliance with the specific ERISA provisions governing funding and transfer of plan sponsorship, and (2) WCI's decision to sell the BK Divisions and transfer their pensions plans was a business decision not subject to ERISA's fiduciary provisions.

We address these arguments in reverse order. ERISA permits an employer to function as both a plan administrator and a plan sponsor. 29 U.S.C. § 1108(c)(3). The Third Circuit Court of Appeals has summarized principles to guide the courts in deciding whether a corporate management decision falls within the fiduciary functions of ERISA:

> "[W]here an administrator of a plan decides matters required in plan administration or involving obligations imposed upon the administrator by the plan, the fiduciary duties imposed by ERISA attach. Where, however employers conduct business and make business decisions not regulated by ERISA, no fiduciary

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4 Because of our disposition of the within motion to dismiss, we need not decide WCI's argument in a footnote that ERISA does not provide a cause of action against non-fiduciaries.

> duties apply. And, when employers wear "two hats" as employers and administrators " . . . they assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA."

Payonk v. HMW Industries, Inc., 883 F.2d 221, 225 (3d Cir. 1989) (citations omitted). To determine whether the decision to sell the BK divisions and transfer the associated plans was a corporate management decision we must ask who had the authority to make the decision: WCI acting in its role as employer or WCI acting in its role as plan administrator? Trenton v. Scott Paper Co., 832, F. 2d 806, 809 (3d Cir. 1987), cert. denied, 485 U.S. 1022 (1988); Payonk, 883 F.2d at 227.

Clearly the decision to sell the BK Divisions was a corporate business decision that was outside the scope of ERISA'S protective rules. Only WCI corporate directors could make the decision to sell divisions and structure the transaction to include existing plans.

Case law cited by Plaintiffs concerned either asset management by plan administrators, see Hickerson v. Velsicol Chemical Corp., 778 F.2d 365 (7th Cir. 1985), cert. denied, 479 U.S. 815 (1986), or misrepresentations to plan participants by fiduciaries, see Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154 (6th Cir. 1988); Local Union 2134, United Mine Workers v. Powhatan Fuel, Inc., 828 F.2d 710 (11th Cir. 1987). These decisions are inapplicable. The alleged understatement of pension liabilities was made to the buyer, BKC, and there is no allegation of mismanagement of the Plans' assets.

Plaintiffs also contend that because of an alleged conflict of interest, WCI was required to appoint a neutral fiduciary. However, such an appointment would not have impacted the structure or substance of the transaction at issue. Moreover, the

decisions cited by Plaintiffs pertain to actions by plan administrators regarding management of plan assets or plan administration that were allegedly taken for business reasons and did not address action taken by employers in their corporate management capacity. See Donvan v. Bierwirth, 680 F.2d 263 (2d Cir.), cert. denied, 459 U.S. 1069 (1982); Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984); Schwartz v. Interfaith Medical Center, 715 F. Supp. 1190 (E.D.N.Y. 1989). We conclude that the decision to transfer the Plans was a business decision not regulated by ERISA.

Of course ERISA's statutory obligations must be fulfilled when a plan is merged, transferred or acquired. When an employer is acting in this administrative capacity fiduciary duties attach. ERISA prescribes specific rules relative to the merger of plans and the transfer of plan assets and liabilities. Section 208 of ERISA, 29 U.S.C. § 1058, establishes the standard for funding of transferred, merged or acquired pension plans: The accrued benefit or any plan participant or beneficiary must not be lower immediately after the effective date of the merger or transfer than it was immediately before such merger or transfer. Requirements governing the change of corporate sponsorship are set forth in the Pension Benefit Guaranty Corporation ("PBGC") regulations 29 C.F.R. § 2615.23(a)-(e). These regulations require that WCI provide financial and actuarial information to the PBGC concerning the Plans and their former and current sponsors. Plaintiffs do not allege that WCI violated any of these provisions.

Plaintiffs aver that WCI breached its fiduciary duties through an alleged scheme to avoid unfunded pension liability through its sale to an undercapitalized buyer. In a case quite similar to the instant action, United Steelworkers of America, Local 2116 v. Cyclops Corp., 860 F.2d 189 (6th Cir. 1988), the seller sold a portion of its operations to a buyer who agreed to assume all accrued pension liabilities for the transferred employees. Following the transaction, the buyer went bankrupt. The allegations of the sellers' breach of fiduciary duty included

"(1) insufficient funding of the [transferred] plan; (2) [the seller's] desire to avoid pension liabilities by sale of the pension fund; and (3) concern over the potential insecurity of pension funding by [the buyer]." Id. at 198. The appellate court found that although the accrued benefits of the plan exceeded the fund assets, the seller's compliance with ERISA's provisions for the funding of merged, transferred or acquired pension plans as set forth in 28 U.S.C. §1058 precluded a finding that a fiduciary breach had occurred. Id. at 198-200. As to the "solely in the interest/exclusive purpose of benefitting" fiduciary duty contained in 29 U.S.C. § 1104(a) (1) (A) (i), the court construed "this language in less than absolute terms." Id. at 200. That as a result of the transaction the seller avoided some of its pension liability was incidental to the benefits received by the employees. Such benefits included the continued employment of individuals through the sale of assets to the buyer, the transfer of the proportionate share of pension assets and a pension plan virtually identical to the plan of the seller. In summary, the court concluded that a fiduciary's duty is fulfilled so long as the seller complied with ERISA's standard for funding of a merged, transferred or acquired pension plan. That the seller was motivated by a desire to avoid pension liabilities by selling the pension fund, that the buyer was financially insecure and that the plan was underfunded were facts of no consequence.

Plaintiffs have not contended that the transaction involved WCI's administration of the Plans and the Plans' assets nor have they directed us to case law in support of their theory that an employer who has complied with ERISA's provisions on pension plan funding and transfer of assets somehow has fiduciary duties extending beyond those enumerated in the statute. The decision to sell the BK Divisions and transfer the Plans did not involve administration of the Plans, management of the Plans' assets, calculation of pension benefits or determination of pension eligibility. Although WCI may have been motivated by a desire to avoid unfunded pension liability and transferred the Plans to an undercapitalized buyer, we agree with the reasoning and holding

in the Cyclops decision that compliance with ERISA's specific provision satisfies WCI's fiduciary obligations under ERISA. We hold that Plaintiffs have failed to state a cause of action for breach of fiduciary duty under ERISA in Counts I and II of the Amended Complaint.

2. Count III

The specific prohibitions of ERISA § 406 supplement the general fiduciary obligations imposed by § 404. Plaintiffs have alleged in Count III of the Amended Complaint that the sale of the BK Divisions and associated transfer of the Plans by WCI violated sections 406(a)(1)(D) and 406(b) of ERISA, 29 U.S.C. §§ 1106(a)(1)(D) and 1106(b).

Section 406(a) prohibits a plan fiduciary from causing transactions between a plan and a part in interest while § 406(b) bars transactions between a plan and its fiduciary including dealing with a plan's assets in the fiduciary's own interest or on behalf of a party whose interests are adverse to a plan or its participants or beneficiaries. 29 U.S.C. § 1106.

In our opinion, the facts alleged by Plaintiffs cannot state a claim under § 406. Plaintiffs have not suggested that BKC is a party in interest. As an employer WCI is by definition a party in interest under 29 U.S.C. § 1002(14)(C) and, as sponsor of the Plans, is a plan fiduciary. Plaintiffs would read § 406 as prohibiting transfer of a plan upon the sale of a business. However, as discussed above, 29 U.S.C. § 1058 specifically provides for procedures to properly effect mergers or transfers of pension plans. Plaintiffs' interpretation of § 406 has been specifically rejected by the Sixth Circuit Court of Appeals. See Cyclops, 860 F.2d at 202 (Construing 29 U.S.C. § 1106 in such a way would conflict with § 1058's permissive attitude toward mergers.).

Regarding Plaintiffs' allegations of self-dealing, in Payonk v. HMW Industries, Inc., supra, the court found that the employer's decision to terminate the pension plan and capture surplus assets was not a self-dealing transaction under § 406 because the decision to amend the pension plan was a corporate decision. Payonk, 883 F.2d at 230-231. In the instant action the decision to transfer the Plans was, as discussed above, a business decision. Section 406 applies to transactions caused by a plan fiduciary. WCI was acting in its corporate capacity when it decided to transfer the Plans associated with sale of the BK Divisions.

Cases cited by Plaintiffs concerned transactions involving the investment of plan assets or transactions to which the plan was a party.[5] Here, the transaction did not involve the investment of management of plan assets. There was a change in sponsorship of the Plans while the Plans' assets remained unaffected.

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5 See Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629 (W.D. Wis. 1979) (Section 406 was violated by loan of plan assets to employer's affiliate.); Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984) (plan fiduciaries' investment of plan assets in companies involved in corporate control contests violated § 406); M&R Investment Co. v. Fitzsimmons, 685 F.2d 283 (9th Cir. 1982) (plan trustees' agreement to loan money to an affiliate of the employer stated a claim under § 406); McDougall v. Donovan, 552 F. Supp. 1206 (N.D. Ill. 1982) (plan trustees' use of plan funds to acquire aircraft indirectly from an employee organization violated § 406); Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (Use of plan assets to purchase employer's stock for inadequate consideration stated a § 406 claim); Cutaiar v. Marshall, 590 F.2d 523 (3d Cir. 1979) (loans between plans with shared fiduciaries violated § 406).

B. INTERFERENCE WITH PARTICIPANTS' PENSION RIGHTS

Plaintiffs have alleged in Court IV of the Amended Complaint that the sale of the BK divisions and transfer of the associated Plans by BKC and Does caused the discharge of the Plans' participants from employment by WCI for the purpose of interfering with participants' attainment of rights under the Plans in violation of § 510 of ERISA, 29 U.S.C. § 1140. Am. Compl., ¶ 38. WCI contends that the transfer of the Plans does not amount to an interference with pension rights under § 510 because the participants' rights under the Plans remained the same before and immediately after the sale of the BK Divisions.[6]

Section 510 of ERISA prohibits employers from taking any action inimical to an employee's participation in a pension benefit plan "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140. The prohibitions of § 510 are primarily aimed at preventing unscrupulous employers from discharging or harassing their employees to prevent them from attainment of vested pension rights. West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980). In addition § 510 was designed "to protect the employment relationship that gives rise to an individual's pension rights." Id.

We first note that the sale of the BK Divisions to BKC did not violate § 510. See Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986) cert. denied, 481 U.S. 1016 (1987)

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6 WCI also argues that Plaintiffs have no standing to seek relief under § 510. Section 510 by its terms limits relief to remedies in equity. See 29 U.S.C. §§ 1140, 1132(a). However, it is clear on the face of the Amended Complaint that Plaintiffs seek both legal and equitable remedies.

(The sale of an ongoing business is not prohibited by § 510.). As stated by the Sixth Circuit Court of Appeals, the anti-discrimination language of § 510 is aimed at protecting individual rights rather than the overall financial integrity or financial security of pension funds. West, supra, 621 F.2d at 246 (In West secondary picketing of a coal mine was not purposeful interference with the attainment of pension rights even though the picketing caused the mine to cut back production and thus reduced employer contributions to the welfare and pension funds).

Section 510 protects against actions by employers which are taken for the purpose of interfering with attainment of pension eligibility. Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir.), cert. denied, 484 U.S. 979 (1987). In this case, WCI's sale of the BK Divisions and transfer of the Plans did not affect the participants' eligibility for benefits under the Plans. Although there was a change in employers, the employees who were participants in the Plans prior to the sale of the BK Divisions continued their participation immediately after the sale. It was only the Plans' sponsorship that was altered while the participants' rights under the Plans remained unchanged. Since the sale and transfer of the Plans did not interfere with the participants' pension eligibility, Plaintiffs have not stated a cause of action under § 510.[7]

---

[7] Plaintiffs' argument that the transaction was for the purpose of avoidance of unfunded pension liabilities may be read as a request to expand § 502 to encompass the area of predecessor liability. However, the appropriate vehicle for addressing predecessor liability is covered in ERISA § 4069, 29 U.S.C. § 1369, which allows the imposition of termination liability where the principle purpose of the transaction taking effect within five years of the termination was to avoid liability. To construe § 510 in such a way would render § 4069 superfluous and would be contrary to basic statutory construction. Painters of

C. COUNT V

In Count V of the Amended Complaint Plaintiffs seek relief under § 4070 of ERISA, 29 U.S.C. § 1370, based on allegations that WCI violated ERISA sections 4062 and 4069, 29 U.S.C. § 1362, 1369. Plaintiffs' claims and arguments under these sections are identical to those raised and argued by the Pension Benefit Guaranty Corporation ("PBGC") in the related action, Pension Benefit Guaranty Corporation v. White Consolidated Industries, Inc., Civil Action No. 91-1630.[8]

1. Liability under ERISA § 4062, 29 U.S.C. § 1362.

Section 4062 of ERISA provides that where a "single-employer plan is terminated . . . , any person who is, on the termination date, a contributing sponsor of the plan . . . shall incur liability under this section . . ." 29 U.S.C. § 1362(a) (as amended) ("1986 version"). The version of § 4062 in effect in September 1985 ("pre-1986 version") imposed liability on the employer at the time of termination of a single-employer plan.[9]

Footnote continued from previous page

Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146, 1151 n. 6 (3d Cir. 1989).

8 WCI has incorporated its response in the related action in its Reply Memorandum. Additionally, WCI has argued that Plaintiffs lack standing under 29 U.S.C. § 1370 because they are limited to seeking equitable relief. However, as explained in note 6, supra, Plaintiffs' demand clause includes a prayer for injunctive and other equitable relief.

9 The version of § 4062 in effect in 1985 reads:

Footnote continued from previous page

"§ 1362 [ERISA § 4062]. Liability of employer

(a) Employers covered

This section applies to any employer who maintained a single-employer plan at the time it was terminated, but does not apply --

. . .

(b) Amount of liability

Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of ---

(1) the excess of ---

. . . "

In 1986 § 4062 was amended as follows:

"§ 1362 [ERISA § 4062]. Liability for termination of single-employer plans under distress termination or termination by corporation.

(a) In general

In any case in which a single-employer plan is terminated in a distress termination under section 4041(c) or a termination otherwise instituted by the corporation under section 4042, any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's control group shall incur liability under this section. The liability under this section of all persons shall be joint and several. The liability under this section consists of ---

. . . "

Plaintiffs contend under a theory of "implied termination" set forth in In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel ("Harvester"), 681 F. Supp. 512 (N.D. Ill. 1988), that at the time of the sale of the BK Divisions the Plans were effectively terminated and WCI is liable under the pre-1986 version of § 4062. Under the pre-1986 version of § 4062 the court concluded in Harvester that "[a]n employer, who with the sale of his business, delegates his pension obligations is liable if a principal purpose of the sale is to evade pension liability and if, objectively, his buyer lacks a reasonable change of meeting those obligations." Id. at 526.

The issue of predecessor liability under the Harvester court's implied termination theory is discussed in the PBGC Opinion. We adopt our analysis set forth in the PBGC Opinion and quote:

> " . . . Congress made it plain that the 1986 version of [§ 4062(a)] applied to plans which had not been terminated or for which termination proceedings had not been instituted before January 1, 1986. 29 U.S.C.A. § 1341 at 107 (1990) (Note on Effective date and application of amendments made by Title XI of Act, Apr. 7, 1986; temporary procedures). Therefore, the 1986 version should apply to all of the Plans including Plan 003.
>
> The plain language of the 1986 version imposes liability on a person who is a contributing sponsor on the date a plan is terminated by the corporation under section 4042 [29 U.S.C. § 1342]. See [n. 9], supra. We find nothing ambiguous in this language. The termination date of a single-employer plan is defined as the "date established by the plan administrator and agreed to by the corporation."

29 U.S.C. § 1348(a)(3). There is no suggestion that there can be two termination dates: one implied and the other pursuant to the statute.

. . . . .

In Harvester, International Harvester Company ("IH") sold the assets of its Wisconsin Steel Division in a 100% leveraged buyout to Envirodyne in July, 1977. The title to the assets was held by Envirodyne's newly created Wisconsin Steel Corporation ("WSC"). WSC filed for bankruptcy in March 1980. Since WSC could not pay the unfunded vested pension benefits, the PBGC stepped in and sought funds from IH. On the eve of trial after six years of discovery, IH moved to dismiss the PBGC's complaint.

The Harvester court concluded that some form of predecessor liability existed under [§ 4062] prior to the 1986 amendments. The decision was based on the legislative history of two statutes: [§ 4069] and the pre-1986 version of [§ 4062]. As discussed earlier, prior to 1986, [§ 4062] imposed liability on an employer who maintained a plan at the time of its termination. In 1986, when Congress amended the termination liability provisions of ERISA (also known as the Single Employer Pension Plan Amendments Act of 1986), [§ 4069(a)] was added. [Section 4069(a)] expressly provided for predecessor liability under certain specified circumstances. [Section 4069(a)] did not apply to transactions which were effective before January 1, 1986.

From the legislative history of the pre-1986 version of [§ 4062], the most that can be said is that Congress did not consider the issue of predecessor liability. However, after

examination of the legislative history of [§ 4069], the Harvester court concluded that Congress did not intend for the pre-1986 version of [§ 4062] to be read literally and that [§ 4069] was an expression of liability which had existed under the older version of [§ 4062]. One other court has questioned the logic of the conclusion in Harvester. See In re Doskocil Cos. Inc., 130 B.R. 858 (Bkrtcy. D. Kan. 1991).[10]

While we believe that the natural reading of the pre-1986 version of [§ 4062] clearly refers to the time of a plan's actual termination, we need not reject the rationale of Harvester. In Harvester, although a time limit for implied termination claims under [§ 4062] was not defined, the theory of liability contemplated circumstances where an employer transfers "his duties to a pension plan with substantial unfunded liabilities to a buyer who economically had little chance to succeed . . ." Harvester, 681 F. Supp. at 525. As discussed earlier, the Harvester court determined, in part through the legislative history of the passage of [§ 4069(a)] in 1986, that Congress had intended the older version of § 1362 to encompass some form of predecessor liability. [Section 4069(a)] put a five year limit on exposure to predecessor liability . . . The Harvester court conceded that the pre-1986 version of [§ 4062] would have

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10 In Doskocil, while questioning the conclusion in Harvester, the court found it unnecessary to denounce the decision because the seller, unlike IH, was insolvent at the time of the sale of certain of its divisions and there were no facts developed questioning the financial position or expertise of the buyer at the time of the sale.

> some time-limit for exposure to liability for plan termination. Id. at 525. The buyer, WSC, had filed for bankruptcy within three years of the asset sale. Id. at 515.
>
> If we were to accept without question the validity of the implied termination theory in Harvester, we do not believe it extends to circumstances where the buyer remains in business and the plans have not terminated within five years of the sale. In this case BKC was in business at the time the Amended Complaint was filed and is still in business. The only plan to have terminated, Plan 003, was not terminated until 6 1/2 years after the asset sale. The other Plans remain in effect. These facts oppose application of the implied termination theory set forth in Harvester."

PBGC Opinion at 11-15.

For the above reasons as set forth in the PBGC Opinion, we conclude that Plaintiffs have failed to state a claim under section 4062 of ERISA.

Plaintiffs claim that in any event WCI is liable under § 4069 of ERISA arguing that the five annual payments of $4 million to the Plans during the years 1986 through 1990 constituted evasive transactions to evade liability for its pension obligations.

As Plaintiffs have made the same arguments as the PBGC did in the related action we again quote and adopt our analysis as set forth in the PBGC Opinion:

> "[Section 4069(a)] reads in pertinent part: '(a) Treatment of transactions to evade liability. If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date. This subsection shall not cause any person to be liable under this subtitle in connection with such plan termination for any increases or improvements in the benefits provided under the plan which are adopted after the date on which the transaction referred

> to in the preceding sentence becomes effective.'

As noted earlier, the effective date of this subsection was January 1, 1986.

From a plain reading of [§ 4069], if the 'transaction became effective' on the date of the asset sale, September 27, 1985, WCI cannot be found liable since there was no plan termination in the ensuing 5 years. The issues we address are whether the date of WCI's final payment to the Plans constituted the effective date of the transaction (Count IV) and whether WCI's payments to the Plans are separate transactions within the meaning of [§ 4069(a)] (Count V).

On September 27, 1985 BKC assumed virtually all the assets of the BK Businesses and assumed all the liabilities of the Businesses including the Plans . . . The Agreement of Purchase and Sale expressly provided that on the closing date, September 25, 1985, BKC succeeded to all responsibility for the pension liabilities of the assumed Plans . . . The agreements effecting the asset transfer also obligated WCI to pay directly to the transferred Plans a total of $20 million in five annual installments beginning September 15, 1986 . . .

Both parties have cited In re Doskocil Cos. Inc. where the court found that "[a] 'transaction to avoid liability' contemplates a transfer of responsibility for meeting the funding requirements of ERISA." In re Doskocil Cos. Inc., 130 B.R. at 868. As noted above, the Agreement was clear on its face that legal responsibility for meeting ERISA obligations was assumed by BKC on the closing date.

The PBGC, relying on SEC Staff Accounting Bulletin 40, contends that

responsibility for funding under ERISA did not transfer to BKC until WCI's final payment to the Plans was made. In assessing whether legal transfer of ownership of one or more business operations has resulted in a divestiture for accounting purposes the SEC Staff opined that 'the principal consideration must be an assessment of whether the risks and other incidents of ownership have been transferred to the buyer with sufficient certainty.' SAB 40, Topic 5E, 6 Fed. Sec. L. Rep. (CCH) ¶ 7,141 at 64,259-64,260. 'When the facts and circumstances are such that there is a continuing involvement by the seller in the business,' it is questionable whether the transaction is a divestiture. Id. at 64, 260. Since the PBGC has made no allegations of any continuing involvement by WCI in BKC's business, WCI's final payment to the Plans did not alter the date of legal transfer of the Plans. Under a plain reading of the Agreement of Purchase and Sale the transfer of the Plans and obligation to meet ERISA's funding requirements occurred September 27, 1985. The final payment to the Plans by WCI in September 1990 did not change the effective date of the transaction at issue, i.e. the asset sale and transfer of the assumed Plans, because WCI was not responsible under ERISA for meeting the assumed Plans' funding. WCI was neither an employer nor a plan sponsor after September, 1985. Since the asset sale occurred prior to the effective date of [§ 4069(a)], the PBGC has failed to state a cause of action under Count IV.

In Count V, the PBGC alleges that each of WCI's annual $4 million payments to the Plans beginning in September 1986 and ending

September 1990 was a transaction under [§ 4069]. Under this theory WCI could be liable for any plan termination occurring prior to October 1995.

We do not believe that the individual payments to the Plans made pursuant to the 1985 asset sale constituted separate transactions to evade liability within the meaning of [§ 4069]. The obligation to make these payments was incurred by WCI as part of the asset sale on the closing date. There are no allegations that the payments were contingent on a future event nor that there were any subsequent renegotiations of the payment obligations between BKC and WCI. The amount of the payments remained constant regardless of any fluctuation in the actual liabilities of the Plans. WCI was merely fulfilling its contractual obligations which were fixed at the time of closing.

[Section 4069(a)] expressly provides that for any person found liable as the result of plan termination, such person is not responsible for any enlargement of plan benefits which occurred after the transaction becomes effective. If payments to plans by a seller in the same circumstances as WCI were to be viewed as separate transactions, then the seller could be found liable for promises made post-closing by the buyer. This result contradicts the plain language of the statute.

The PBGC argues that Congress' intent in enacting [§ 4069(a)] was to protect the PBGC's insurance program from companies who foist unfunded benefits onto a weaker company or in other ways attempt to escape liability for their pension promises. However, it was also Congress' intention to limit exposure to liability

under [§ 4069(a)] to five years after the transaction. H.R. Rep. No. 241, 99th Cong., 1st Sess., Pt. 2 at 56 (1985), reprinted in 1986 U.S.C.C.A.N. 685, 714. If a seller's post-sale contributions were to extend the effective date of the transaction, then the five-year limitation would become, for most purposes, meaningless. See Doskocil, 130 B.R. at 868-869.

Under the PBGC's regulations a reportable event occurs when a transaction, involving a transfer of assets of a single-employer plan which is not funded of $1 million or more, results in a new contributing sponsor. 29 C.F.R. § 2615.23(a). Notice of this reportable event must be filed with the PBGC within 30 days of its occurrence. 29 C.F.R. § 2615.3(a). In addition to required information in the notice which includes financial information, the PBGC may require submission of additional information. 20 C.F.R. § 2615.3(d). Since the PBGC can commence its scrutiny of the transaction at this point and has 5 years in which to decide whether to terminate the transferred plan, Congress' concern with plan sponsors ignoring their pension promises and protection of the insurance program is not impeded.[11,12]"

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11 The PBGC has wide discretionary authority to terminate a plan. For example, if the PBGC determines that "the possible long-run loss of the [PBGC] may reasonably by expected to increase unreasonable if the plan is not terminated", the PBGC may institute termination proceedings. 29 U.S.C. § 1342(a)(1).

12 Notice of the transfer of the Plans from WCI to BKC was sent to the PBGC on or about October 25, 1985. In July 1987 the PBGC

PBGC Opinion at 16-20.

For the reasons as quoted from the PBGC Opinion, Plaintiffs have failed to state a claim under § 4069 of ERISA, 29 U.S.C. § 1369. Accordingly, dismissal of Count V of the Amended Complaint is proper.

An order follows.

/S/ Barron P. McCune
BARRON P. McCUNE
SENIOR UNITED STATES DISTRICT JUDGE

cc: Counsel of record

Footnote continued from previous page

accepted the notice as filed and determined that no further action was necessary.

cc: J. Frank McKenna, III, Esquire
Kenneth R. Bruce, Esquire
Babst, Calland, Clements and Zomnir, P.C.
Two Gateway Center
Eighth Floor
Pittsburgh, PA 15222

William G. McGuiness, Esquire
Fried, Frank, Harris, Shriver & Jacobson
One New York Plaza
New York, NY 10004

Robert S. Garrett, Esquire
Egler, Garrett & Egler
2100 Lawyers Building
428 Forbes Avenue
Pittsburgh, PA 15219

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3676

PENSION BENEFIT GUARANTY CORPORATION,

Appellant,

v.

WHITE CONSOLIDATED INDUSTRIES, INC.,
c/o CT Corporation Systems
Registered Agent

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge; BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and ROSENN*, Circuit Judges

The petition for rehearing filed by appellee having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular actice service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted

for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: July 30, 1993

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* As to panel rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3612

THE BLAW KNOX RETIREMENT INCOME PLAN, BLAW KNOX PENSION PLAN, BLAW KNOX IAM PENSION PLAN, BLAW KNOX EQUIPMENT PENSION PLAN, BLAW KNOX DURALOY PENSION PLAN FOR SALARIED EMPLOYEES, BLAW KNOX DURALOY HOURLY PENSION PLAN and FIDUCIARIES DEAN G. WILSON AND RICHARD A. MCINTYRE,

Appellants,

v.

WHITE CONSOLIDATED INDUSTRIES, INC.,
JOHN DOE(S)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge; BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and ROSENN, Circuit Judges

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular actice service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/

Circuit Judge

Dated: July 28, 1993